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Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM, PETITIONER,

vs.

DEAN RUSK, AS SECRETARY OF STATE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1966
CERTIORARI GRANTED OCTOBER 24, 1966

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 21, 1966

[fol. A]

TRANSLATION OF PETITIONER'S ISRAELI IDENTIFICATION BOOKLET

DEPARTMENT OF STATE

Division of Language Services

(Translation)

LS No. 32593
T-C/T-58/R-XVIII
Hebrew & Arabic

[No pages 1 and 2 (probably cover)]

[p. 3]

First name: (Abraim?) Burnsein

Father's first name: (Bait) Ephraim

Surname: Mendel

Registration No. 127883-/3

Issued by Office of Registration: Safad

Date: 31.5 [?] 1951

M. Shapiro

Minister of Interior

Dr. Bar-Tiquvah

District of Registration

[p. 4]

[Photograph]

[Signature under photo] Ephraim Bait-Ephraim

[First stamp] Voted in the municipal elections in Safad—1959

[Second stamp] Voted for the Fourth Kenesset [Israeli Parliament]

[p. 5]

Date of birth: 1892 (1893)

Place of birth: Poland

Sex: male

Civil status: Married

Citizenship: United States of America

Religion: Jewish

Registration No. 127883-/3

[No pages 6 and 7]

[fol. B] [p. 8]

Address at time of issuance of identification card:
55–15th Street, Safad

[p. 9]

Miscellaneous

[Stamped notation at top of page]
Vol. Folio 12-1331 1949

[Stamps] (b) Received Ration Card—1951

(d) Received [rest is illegible]

(h) Received a points book—1954

(j) Received ration card—1955/56

(f) Voted for the Second Kenesset [Israeli Parliament]

[p. 10]

2 stamps [not translated] a) Voted for the Third Kenesset [Israeli Parliament]

g) Voted in the municipal elections of 1955

[p. 11]

No. 879347

[fol. 1]

IN THE UNITED STATES DISTRICT COURT /
FOR THE SOUTHERN DISTRICT OF NEW YORK

BEYS AFROYIM, Plaintiff,

vs.

DEAN RUSK, as Secretary of State.

OPINION, JUDGMENT, AND ORDER OF DISTRICT COURT—
February 25, 1965

BRYAN, District Judge:

In this declaratory judgment action plaintiff, who has lost his American citizenship under § 401(e) of the Nationality Act of 1940, 8 U. S. C. § 1481(a)(5), challenges the constitutionality of that section.

While it does not appear whether plaintiff was within the United States when the action was commenced, there is jurisdiction in any event. If he was, this court has jurisdiction under § 360(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1503(a). If he was not, this court has jurisdiction under § 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, as implemented by the Declaratory Judgment Act, 28 U. S. C. § 2201. See Rusk v. Cort, 369 U. S. 367 (1962).

Both parties have cross-moved for summary judgment on stipulated facts pursuant to Rule 56(a), (b), F. R. C. P.

Plaintiff was born in Poland in 1893, and emigrated to the United States in 1912. He became a naturalized citizen in this court on June 14, 1926.

Some time during 1950 the plaintiff emigrated to Israel. He resided there some ten years, pursuing his profession as an artist. By his residence in Israel plaintiff apparently has acquired Israeli citizenship, though the parties have

not argued the question here. There has been no claim by the plaintiff that the deprivation of his American citizenship will render him a stateless person.

[fol. 2] On November 14, 1960, in preparation for a return to this country, plaintiff applied to the United States Consulate in Haifa for a passport. His application was rejected, and the American Vice Consul issued a Certificate of Loss of Nationality to plaintiff on the ground that he had expatriated himself on July 30, 1951, by casting a ballot in a political election in a foreign state in contravention of § 401(e).[1] The Vice Consul's action was approved by the Passport Office of the Department of State on January 4, 1961. Plaintiff appealed to the State Department's Board of Review on the Loss of Nationality which affirmed the Vice Consul's determination on May 3, 1965. This action followed.

Throughout the administrative proceedings plaintiff contended that he had never voted in an election of the State of Israel, but only entered the polling place to sketch the voters as they cast their ballots. Before this court, however, it is stipulated that on July 30, 1951, plaintiff voted in the elections for the Second Knesset, the Parliament of the State of Israel. And it is agreed that he did so voluntarily.[2]

---

[1] 8 U. S. C. § 1481(a)(5) reads as follows: "From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

* * * * *

"(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory;

* * * * * *"

[2] The effect of this stipulation is to remove the oft-litigated issue of duress from the case at bar. See, e.g., Tanaka v. Immigration & Naturalization Service, 346 F. 2d 438 (2 Cir. 1965); Takehara v. Dulles, 205 F. 2d 560 (9 Cir. 1953); Acheson v. Kuniyuki, 189 F. 2d 741 (9 Cir. 1951), *cert. den.*, 342 U. S. 942 (1953); Doreau v. Marshall, 170 F. 2d 721 (3 Cir. 1948).

[fol. 3] Plaintiff contends that at no time did he intend to abandon his American citizenship. Defendant refuses to stipulate that this allegation is true or false, but urges that in any event it is immaterial for purposes of deciding the case at bar.

It has been said with good reason that the "[v]iews of the Justices have varied when it comes to the problem of expatriation." Schneider v. Rusk, 377 U. S. 163, 166 (1964). Under these circumstances the task of a District Court, charged with applying the law as declared by the Supreme Court of the United States, is not without its difficulties.

The decision in Perez v. Brownell, 356 U. S. 44 (1958), is directly called into question by the plaintiff in the case at bar. There the Supreme Court by a 5-4 vote squarely upheld the constitutionality of § 401(e) as a proper incident of the power of Congress to regulate foreign affairs; the statute was applied—despite Fifth and Fourteenth Amendment objections—to a natural born American citizen who had voted in political elections in Mexico. Plaintiff candidly concedes that *Perez* would be controlling here, were it not, as he urges, that the vitality of that decision has been so completely undermined by subsequent cases that it no longer has the force of law. I am fully conversant with the speculation to the effect that the Supreme Court in recent years has *sub silentio* overruled *Perez,*[3] but in my view that case is still a precedent binding on this court.

[fol. 4] The issue posed by Justice Frankfurter in *Perez*—and restated as the controlling question by Justice Douglas in the recent case of Schneider v. Rusk, *supra* at 166—is whether "the means, withdrawal of citizenship, [is] reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in

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[3] See, e.g., Tanaka v. Immigration & Naturalization Service, 346 F. 2d 438, 447-48 n. 3 (2 Cir. 1965) (Kaufman, J., dissenting); Agata, Involuntary Expatriation and Schneider v. Rusk, 27 U. Pitt. L. Rev. 1 (1965); Kurland, Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government, 78 Harv. L. Rev. 143 (1964).

the conduct of our foreign affairs." 356 U. S. at 60. In *Perez* the court answered that question in the affirmative as to § 401(e), finding that it was the "possession of American citizenship" that made the act of voting in a foreign political election "potentially embarrassing to the American government and pregnant with the possibility of embroiling this country in disputes with other nations." *Ibid.* It was therefore held that Congress could provide for termination of citizenship so as to eliminate the problem.

Perez also flatly rejected the contention that a person, voting abroad in a foreign political election, must intend to give up his citizenship before it may be taken away. Whether § 401(e) requires a purposeful abandonment of citizenship is simply a matter of statutory interpretation which is closed in this court by the *Perez* decision.[4] In any [fol. 5] event, Justice Frankfurter's interpretation is supported by the intent and the plain meaning of the statute as well as by precedent.[5] And it is sustained by reason. Indeed, if, as *Perez* holds, it is the foreign affairs power which supports deprivation of citizenship under § 401(e), then Congress quite justifiably can attach a loss of citizenship for voting in a foreign political election without regard to the voter's intent. It is the "possession of American citizenship" by the voter, not the state of his mind, which poses a hazard to the conduct of our international relations. For example, participation by Americans in the plebiscite

---

[4] Certainly it cannot be said that intent must necessarily be included as an element of § 401(e) in order to save its constitutionality. There is even a serious question as to whether the Constitution in any significant degree forbids *criminal* punishment for unintentional conduct. See Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57 (1910); Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107. Much less would it prohibit the application of § 401(e)—which is non-penal in nature, see pp. 8-9 *infra*—to an actor who was unaware of the consequences of his conduct.

[5] E.g., Savorgnan v. United States, 338 U. S. 491 (1950); Makenzie v. Hare, 239 U. S. 299 (1915); Acheson v. Kuniyuki, 189 F. 2d 741 (9 Cir. 1951), *cert. den.* 342 U. S. 942 (1952).

to determine sovereignty over the Saar—activity which was the immediate catalyst for the passage of § 401(e)—did not hamper the conduct of foreign affairs any the less because some of those voting may have had no intention of abandoning their American citizenship.

Since *Perez* is direct authority against plaintiff on the question presented here, the function of this court is only to determine whether the vitality of that decision has survived. The four Justices who dissented in *Perez* joined in the opinion of the Court in Trop v. Dulles, 356 U. S. 86 (1958), which held unconstitutional a statute denationalizing any citizen who had been convicted of desertion by a court-martial. One Justice concurred on a separate ground. [fol. 6] Four others dissented. Unconstitutionality,* in the opinion of the Court, rested upon: (1) a total inability of Congress to effectuate a deprivation of citizenship except on voluntary renunciation, and (2) the cruel and unusual punishment clause of the 8th Amendment. Neither factor has significance here.

As to the first ground, the view that Congress is incapable of accomplishing involuntary expatriation has simply "not yet commanded a majority of the entire Court." Schneider v. Rusk, *supra* at 166. The second ground in *Trop,* the cruel and unusual punishment clause, is inapplicable to the case at bar because § 401(e) is non-penal in nature. Justice Frankfurter concluded in *Perez* that the statute was designed to prevent intentional or unwitting interference with the foreign relations of the United States by an American citizen abroad. The purpose of the statute, he held, was regulation, not punishment.

It was for this reason that the mere casting of a ballot in a foreign political election—conduct on its face quite harmless or even commendable—was deemed to be sufficient to trigger the drastic and irremediable sanction of forfeiture of citizenship. Thus *Trop* cannot be said to undermine *Perez.* It is not open for plaintiff to contend here that § 401(e) is in essence a penal law passed in a spirit of

* Unconstitutionally in original.

vindictiveness, and must satisfy constitutional standards more stringent than those applied in *Perez*.

The holding in *Perez* that § 401(e) is non-penal in nature also distinguishes the present case from the two decisions in Kennedy v. Mendoza-Martinez, 372 U. S. 44 (1963). The Supreme Court there invalidated §§ 401(j) and 349(a)(10) [fol. 7] of the Nationality Act of 1952 "because in them Congress [had] plainly employed the sanction of deprivation of nationality as a punishment—for the offense of leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the 5th and 6th Amendments." *Id.* at 165-66. *Perez*, however, was considered by the Court to be distinguishable because § 401(e) was supported by "legislative history totally different from that underlying §§ 401(j) and 349(a)(10)." *Id.* at 164; see *id.* at 170 n. 30. Thus the reservation in *Mendoza-Martinez*, rather than the decision, is instructive here.

In addition to contending that *Perez* has been in effect overruled by recent cases, plaintiff directly assails the reasoning of that decision. He attacks the wisdom—and even the rationale—of a statute which presumes that an American citizen by merely voting in a foreign political election could involve this country in international difficulties. He challenges the conclusion in *Perez* that "the citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government," 356 U. S. at 59, because any citizen may do that simply by voting in this country for a candidate who turns out badly or by exercising his rights of free speech at home or abroad. Plaintiff seeks to discount any danger in the possibility that the "people or government of the foreign country may regard [the voter's] action" to be a "reflection if not an expression" of the policy of the United States, *ibid.*, because the same likelihood obtains whenever [fol. 8] an American citizen abroad expresses his views on any matter of political import.

Plaintiff's attacks upon § 401(e) and upon these isolated observations in the *Perez* opinion are not wholly unpersuasive. But in the delicate field of constitutional adjudication a court is not called upon to pass on the wisdom or the efficacy of a statute; the question is only "whether or not Congress may have concluded not unreasonably that there is a relevant connection between [the] fundamental source of power and the ultimate legislative action." *Id.* at 58. *Perez* found a sufficient connection. It is not within the province of this court to overrule that conclusion. Suffice it to say that *Perez*, read as a whole, holds that the Constitution does not deny Congress the power to prevent American citizens from engaging in the processes of political decision in a foreign state, regardless of whether our government is interested one way or another in the specific outcome of the election or interested only in maintaining an appearance of circumspect neutrality. *Perez* confirmed a Congressional power to determine that the formulation of sensitive political decisions vitally important to a foreign state—and indirectly affecting the international community at large—should properly be conducted without the participation of American citizens.

Beyond this, Congress might well conclude that a citizen's voting abroad constituted conduct "inconsistent with undiluted allegiance to this country." Kennedy v. Mendoza-Martinez, *supra* at 214 (Stewart, J., dissenting). As was said in Acheson v. Wohlmuth, 196 F. 2d 866, 870 (D. C. Cir.) *cert. den.*, 344 U. S. 833 (1952):

> [fol. 9] "the intent of Congress in the Nationality Act was to attach the consequence of loss of citizenship to conduct which substantially evidences allegiance to a government existing in a territory other than our own * * *. When we come to consider the meaning of Section 401(e) as a whole, it becomes apparent that Congress there sought to distinguish between acts performed in the interest of maintaining our own govern-

mental institutions and acts which tend to support or implement institutions other than our own."

Thus, if it is now the law that Congress may effectuate a withdrawal of the precious rights of citizenship only upon conduct evincing something less than full allegiance to this country, compare Schneider v. Rusk, *supra* at 168 (Douglas, J.), with *id.* at 178 (Clark, J., dissenting), then § 401(e) satisfies that test. Indeed, the suggestion in *Perez* that in the opinion of Congress voting in a foreign political election could import "allegiance to another country" in some measure "inconsistent with American citizenship," 356 U. S. at 61, might well be the source of the doctrine which apparently gained a consensus of the Justices in *Schneider*.

In my view the authority of *Perez* v. *Brownell* still stands and is controlling here. This conclusion is in full accord with the decisions of the Second Circuit in which the vitality of *Perez* was at least collaterally challenged. Tanaka v. Immigration & Naturalization Service, 346 F. 2d 438 (2 Cir. 1965); United States ex rel. Marks v. Esperdy, 315 F. 2d 673 (2 Cir. 1963), aff'd by an equally divided [fol. 10] court, 377 U. S. 214 (1964). See also Rocha v. United States, 351 F. 2d 523 (1 Cir. 1965), petition for cert. filed, 34 U. S. L. Week 3272 (U. S. Jan. 10, 1966).

Defendant's motion for summary judgment is granted. Plaintiff's oral cross-motion for the same relief is denied. Judgment will be entered accordingly.

It is so ordered.

[fol. 11]

IN THE UNITED STATES DISTRICT COURT

STIPULATION

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties:

1. Plaintiff, who was born in Poland in 1893, emigrated to the United States in 1912. Plaintiff under the name of Ephraim Bernstein, also known as Beys Afroyim, became a naturalized citizen by order of this Court on June 14, 1926.

2. On July 30, 1951 plaintiff voted in the elections for the second Knesset, the Parliament of the State of Israel.

3. The election for the second Knesset was a political election in a foreign state within the contemplation of Section 401(e) of the Nationality Act of 1940.

4. Plaintiff voluntarily voted in the said election.

5. Plaintiff contends that neither at the time of the election nor at any other time did he have any intention or desire to lose or abandon his American citizenship. Plaintiff also contends that he considered himself at all times an American citizen with allegiance to the United States. Defendant will not stipulate with respect to the truthfulness of these allegations. Defendant also maintains that these allegations are irrelevant since a specific intent or desire to lose or abandon American citizenship is not a requisite for expatriation under Section 401(e) of the Nationality Act of 1940.

[fol. 12] 6. On November 14, 1960 the American Vice Consul at Haifa, Israel, issued a Certificate of Loss of Nationality to plaintiff on the ground that he expatriated himself on July 30, 1951 under Section 401(e) of the Nationality Act of 1940 by voting in a political election in a foreign state. The Vice Consul's action was approved by

the Passport Office of the Department of State on January 4, 1961. Plaintiff on January 27, 1965 appealed to the State Department's Board of Review on the Loss of Nationality, and on May 3, 1965 the Board affirmed the Vice Consul's determination.

[fol. 13]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 393—September Term, 1965.

(Argued May 10, 1966)

Docket No. 30413

BEYS AFROYIM, Plaintiff-Appellant,

v.

DEAN RUSK, as Secretary of State, Defendant-Appellee.

OPINION—May 24, 1966

Before: Waterman, Kaufman and Anderson, Circuit Judges.

Plaintiff, who had lost his American citizenship, commenced a declaratory judgment proceeding in the United States District Court for the Southern District of New York to test the constitutionality of 8 U. S. C. §1481(a)(5). The parties stipulated the facts necessary to be ruled upon and cross-motioned for summary judgment. The district court, Bryan, J., granted the motion of the defendant Secretary of State. On plaintiff's appeal the judgment below, 250 F. Supp. 686 (S. D. N. Y. 1966) is affirmed.

[fol. 14] Nanette Dembitz, New York City, for Appellant.

James G. Greilsheimer, Spec. Asst. U. S. Atty.; Robert M. Morgenthau, U. S. Atty., S. D. N. Y.; Francis J. Lyons, Spec. Asst. U. S. Atty., for Appellee.

WATERMAN, Circuit Judge:

Plaintiff commenced a declaratory judgment action in the United States District Court for the Southern District of New York challenging the constitutionality of 8 U. S. C. §1481(a)(5). He alleged that the section is both unconstitutional on its face and as applied to him in that it violates the due process guarantee of the Fifth Amendment and violates Section 1, Clause 1 of the Fourteenth Amendment.

After cross-motions for summary judgment had been filed by both parties, the court below in a reasoned opinion, reported at 250 F. Supp. 686 (S. D. N. Y. 1966), granted the motion filed by the defendant Secretary of State and dismissed plaintiff's complaint on the ground that there was no genuine issue as to any material fact and that the Secretary was entitled to judgment as a matter of law.

Plaintiff, who had been a naturalized citizen of the United States, had suffered the loss of that citizenship on November 14, 1960, on the ground that he had expatriated himself on July 30, 1951, when he had voluntarily voted in an Israeli parliamentary election.[1]

[fol. 15] The court below handed down its order upon a stipulation of the parties which set forth the material facts:

---

[1] Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746; 8 U. S. C. (1946 ed.) §801 provides:

§801. General means of losing United States nationality:

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

* * * * *

(continued on following page)

"1. Plaintiff, who was born in Poland in 1893, emigrated to the United States in 1912. Plaintiff under the name of Ephraim Bernstein, also known as Beys Afroyim, became a naturalized citizen by order of this Court on June 14, 1926.

"2. On July 30, 1951 plaintiff voted in the elections for the second Knesset, the Parliament of the State of Israel.

"3. The election for the second Knesset was a political election in a foreign state within the contemplation of Section 401(e) of the Nationality Act of 1940.

"4. Plaintiff voluntarily voted in the said election.

"5. Plaintiff contends that neither at the time of the election nor at any other time did he have any intention or desire to lose or abandon his American citizenship. Plaintiff also contends that he considered himself at all times an American citizen with allegiance to the United States. Defendant will not stipulate with respect to the truthfulness of these allegations. Defendant also maintains that these allegations are irrelevant since a specific intent or desire to lose or abandon American citizenship is not a requisite for expatriation under Section 401(e) of the Nationality Act of 1940.

[fol. 16] "6. On November 14, 1960 the American Vice Consul at Haifa, Israel, issued a Certificate of Loss of Nationality to plaintiff on the ground that he expatriated himself on July 30, 1951 under Section 401(e) of the Nationality Act of 1940 by voting in a

---

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory.

This provision of the Nationality Act of 1940 was preserved in the Immigration and Naturalization Act of 1952, Ch. 477, Title III, ch. 3, Section 349(a)(5), 266 Stat. 267; 8 U. S. C. §1481(a)(5).

political election in a foreign state. The Vice Consul's action was approved by the Passport Office of the Department of State on January 4, 1961. Plaintiff on January 27, 1965 appealed to the State Department's Board of Review on the Loss of Nationality, and on May 3, 1965 the Board affirmed the Vice Consul's determination."

In his brief upon appeal appellant claims the statute violates the First, Sixth, and Eighth Amendments as well as the Fifth and Fourteenth; the First because Congress has sought by the Act to impose a drastic sanction upon a citizen's freedom to express his opinion on political, social or economic issues, and the Sixth and Eighth because the statute appears to have a punitive ring to it and the safeguards guaranteed by the Sixth to one charged with crime are not made available to one who may suffer, as did this appellant, a claimed "unusual punishment" barred by the Eighth.

We are of course bound by the authority of *Perez* v. *Brownell,* 356 U. S. 44 (1958) wherein a native-born American citizen who voted in a Mexican political election, and who had lost his citizenship thereby, sought to have the U. S. Supreme Court hold that the predecessor statutory provision here challenged was beyond the power of Congress to enact—and wherein the constitutionality of the legislation was upheld.

Appellant contends that subsequent decisions of the Court have so devitalized *Perez* that its holding is no longer a binding precedent. Our attention is directed as evidence [fol. 17] of this claimed devitalization to the case of *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963), which held, as to the citizens involved, 8 U. S. C. §1481(a)(10), a different provision of 8 U. S. C. §1481(a) from the one before us here, unconstitutional. However, the result reached in *Perez* was not affected by *Mendoza-Martinez,* see the opinion for the Court, 372 U. S. 144, at 162-163, the reser-

vations of concurring Justices, pp. 186, 187, and the statement for the dissenting Justices, pp. 202, 203.

Also, we are asked to consider the result the Court reached in *Schneider* v. *Rusk*, 377 U. S. 163 (1964) as also indicative of a weakening of the *Perez* authority. However, at 166-167 of the Court's opinion, written by a *Perez* dissenter, there is a careful explanation of the specific ground upon which *Schneider* was distinguished from *Perez*.

We are even urged to disregard *Perez* because of the holding in a case contemporaneously decided, *Trop* v. *Dulles*, 356 U. S. 86 (1958). In *Trop*, on the facts there, the Court held that 8 U. S. C. §401(g), now 8 U. S. C. §1481(a)(8), again a different provision from 8 U. S. C. §1481(a)(5), was as to *Trop* an unconstitutional enactment while at the same time holding 8 U. S. C. §401(e) constitutional. The thrust of this argument is that the Court in *Perez* did not appear to consider that a denaturalization might be a punishment though the Court had that in mind in *Trop*, decided the same day.

Subsequent to all of the Supreme Court cases cited to us and set forth *supra*, we have, within the year, recognized in *Tanaka* v. *INS*, 346 F. 2d 438 (2 Cir. 1965), the binding authority of *Perez*. We said there:

> "It is not open to question that the voluntary act of voting in a foreign election in 1950 results in expatriation under §401(e) of the Nationality Act of 1940, [fol. 18] the constitutionality of this provision having been expressly affirmed in Perez v. Brownell, 356 U. S. 44, 78 S. Ct. 568, 2 L. Ed. 2d 603 (1958). However, no conduct results in expatriation unless *it is voluntary*. Nishikawa v. Dulles, 356 U. S. 129." (Emphasis supplied.) 346 F. 2d 438, 441.

Admittedly, as stipulated in this case, appellant's participation in the Israeli election was voluntary. Moreover, no claim is made on appeal that appellant has acquired Israeli

citizenship and can therefore be claimed to have dual nationality.

We affirm the judgment below on the authority of *Perez* v. *Brownell, supra,* and *Tanaka* v. *INS, supra.*

The exposition by the court below of the present posture of the issues that were decided by the Court in *Perez* was exhaustive and most penetrating, and we adopt as the rationale for our own opinion the following language in the opinion below at 690:

> "Suffice it to say that *Perez,* read as a whole, holds that the Constitution does not deny Congress the power to prevent American citizens from engaging in the processes of political decision in a foreign state, regardless of whether our government is interested one way or another in the specific outcome of the election or interested only in maintaining an appearance of circumspect neutrality. *Perez* confirmed a Congressional power to determine that the formulation of sensitive political decisions vitally important to a foreign state—and indirectly affecting the international community at large—should properly be conducted without the participation of American citizens."

Affirmed.

[fol. 19] KAUFMAN, Circuit Judge (concurring):

I feel constrained to concur—albeit reluctantly. In *Tanaka* v. *Immigration & Naturalization Service,* 346 F. 2d 438 (2d Cir. 1965) (dissenting opinion), I expressed grave doubt as to whether the Supreme Court's opinion in *Perez* v. *Brownell,* 356 U. S. 44 (1958) retained vitality. And, I questioned there whether *Perez* was not to be limited to its facts in the face of the Court's subsequent holdings in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963) and *Schneider* v. *Rusk,* 377 U. S. 163 (1964). I am still of the view that the Supreme Court's opinion in *Perez,* a bare majority of one ruling, should be narrowly construed and

strictly confined to its facts until that Court is asked to review its interpretation of Section 401(e) of the Nationality Act of 1940,* an event which I believe is inevitable in light of the series of perplexing denationalization opinions rendered by the Supreme Court in its 1963 term. See Kurland, *The Supreme Court 1963 Term—Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 Harv. L. Rev. 143, 169-175 (1964). And, it is not of little interest that Justice Brennan, a member of the five-to-four *Perez* majority subsequently expressed his own "doubts of the correctness of *Perez*, which I joined." *Kennedy* v. *Mendoza-Martinez*, *supra* at 187.

Furthermore, the *ratio decidendi* of *Perez* is not persuasive when applied to the instant facts. I see no reason why an individual who performed the act of voting in a foreign election, after full disclosure of his American ties should be visited with such severe consequences as loss of citizenship and the deportation which will inevitably follow, without a [fol. 20] showing that his voting somehow impeded or interfered with the conduct of this country's foreign affairs. Such interference was the "rational nexus" which Mr. Justice Frankfurter found so essential in *Perez* and which is wholly missing here.

I lean to the view that if Afroyim had not expressly stipulated the facts of his case so as to bring it squarely within the ambit of *Perez*, the result here might have been different. To illustrate, the administrative record, which was not introduced in evidence in the lower court, discloses that unlike *Perez* who did not reveal his American citizenship to the Mexican authorities when he voted there, Afroyim presented his identification booklet—a document which described him as an American citizen—to the Israeli election officials. Thus, Israeli authorities, knowing of Afroyim's American citizenship, would seem to have openly

* This provision has been carried forward as Section 349(a)(5) of the Immigration and Naturalization Act of 1952.

ignored any objection that country might have had to a non-Israeli voting in its elections. It is fair to infer from this that any risk of embarrassment to this country's relationship with Israel by reason of the involvement of Afroyim in Israel's internal affairs was thus removed.

However, in light of the stipulation in this case and because the majority of two panels of this Court believes that *Perez* has not become moribund, I concur reluctantly, as I have already indicated, in the result reached in the majority opinion.

[fol. 21]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BEYS AFROYIM, Plaintiff-Appellant,

v.

DEAN RUSK, as Secretary of State, Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

JUDGMENT—May 24, 1966

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 22] Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 23]

SUPREME COURT OF THE UNITED STATES

No. 456—October Term, 1966

BEYS AFROYIM, Petitioner,

v.

DEAN RUSK, as Secretary of State.

ORDER ALLOWING CERTIORARI—October 24, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT U. S.

AUG 18 1966

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM,

Petitioner,

—v.—

DEAN RUSK, as Secretary of State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1966

BEYS AFROYIM,

Petitioner,

—v.—

DEAN RUSK, as Secretary of State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 24, 1966.

Citations to Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 250 F. Supp. 686 (reproduced *infra,* Appendix p. 10a). The opinion of the Court of Appeals is reported at 361 F. 2d 102 (reproduced *infra* p. 3a).

Jurisdiction

The judgment of the Court of Appeals was entered on May 24, 1966 (*infra* p. 1a). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented for Review

Whether the Federal statute depriving an American citizen of his citizenship on the basis that he has voted in a foreign political election, is invalid under the United States Constitution. Whether the statute violates the guarantee of free expression of the First Amendment; the due process guarantee of the Fifth Amendment; the safeguards of the Fifth, Sixth and Eighth Amendments with respect to the imposition of punishment; and the guarantee of citizenship of the Fourteenth Amendment.

Statute Involved

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746, 8 U. S. C. (1946 ed.) §801, provided:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: • • •
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

This provision is now in force by its reenactment in section 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U. S. C. §1481(a)(5).

Statement

Petitioner's complaint sought a declaratory judgment that Section 401(e) of the Nationality Act of 1940, on its face and as applied to him, is unconstitutional and that he therefore retains his United States citizenship. The District Court judgment, affirmed by the Court of Appeals, granted defendant-respondent's motion for summary judgment and denied plaintiff-petitioner's.

Jurisdiction of the District Court

The District Court had jurisdiction to determine the complaint, whether or not petitioner was in the United States at the time of its filing.[1]

Facts

The facts are undisputed, and appear in the complaint, a stipulation of the parties, and an exhibit submitted by respondent at the District Court hearing.

Petitioner was born in Poland in 1893, emigrated to the United States in 1912, and became an American citizen by naturalization in 1925. In 1950, pursuing his profession as an artist, he went to Israel. In preparation for his return to the United States, to reside here and continue his

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[1] See Section 360(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1503(a), as to suits by persons within the United States; the complaint alleged petitioner's residence in the United States. See Section 10 of the Administrative Procedure Act (5 U. S. C. §1009), the Declaratory Judgment Act (28 U. S. C. §2201), and *Rusk* v. *Cort*, 369 U. S. 367 as to suits by non-residents. Here as in *Rusk*, there had been a final administrative determination by respondent Secretary of State that petitioner had lost his citizenship.

profession, he applied in 1960 to a United States Vice-Consul in Israel for the renewal of his American passport. His application was rejected on the ground that he had cast a ballot in an election in 1951 for the Israeli Knesset, the legislative body of Israel, and that he had thereby lost his American nationality pursuant to section 401(e) of the Nationality Act of 1940. The Vice-Consul's action was affirmed by the State Department's Board of Review on the Loss of Nationality.

According to the stipulation, petitioner voluntarily voted in such election, and it constituted a political election in a foreign state within the meaning of section 401(e). Petitioner asserted in the complaint and stipulation that neither at the time of the election nor at any other time did he intend or desire to lose or abandon his American citizenship and that he considered himself at all times an American citizen with allegiance to the United States. Respondent did not stipulate as to these assertions, maintaining that they are irrelevant.

Respondent's determination that petitioner had voted in the Knesset election in 1951, was based in large part on a stamp placed in his Israeli identification booklet by an Israeli official at the polling-place at the time of such election. The booklet, exhibited by petitioner to the official, specified that petitioner was exclusively an American citizen (see Certified File of Dept. of State, filed as part of Court of Appeals' record, p. 11).

Reasons for Granting Writ

This Court's decision in *Perez v. Brownell*[2] upholding Section 401(e), is inconsistent with the criterion of constitutionality developed since its rendition, and with this Court's standard as to First Amendment rights, which was not there in question. Considered under these criteria, the Section is unconstitutional. Review of its constitutionality is further warranted because significant aspects of its legislative history seem to have been overlooked in the *Perez* decision.

I—Pertinent Criteria of Constitutionality

A. As the concurring judge in the Court of Appeals pointed out (*infra* p. 8a), there is "grave doubt" as to the vitality of *Perez,* in view of the opinions rendered by this Court and by individual Justices since that decision.

The five-judge majority in *Perez* upheld the statute on the ground that Congress, acting under its power "to regulate foreign affairs," "may have concluded not unreasonably that there is a relevant connection between the fundamental source of power" and abrogation of the citizenship of any American citizen who votes in any foreign political election (356 U. S. at p. 58). Because of this rationale, the majority found it unnecessary to determine whether voting by an American citizen in a foreign election could reasonably be deemed to import a withdrawal of his allegiance to the United States; the opinion adverted only obliquely to this possibility.[3]

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[2] 356 U. S. 44.

[3] *Perez* suggests that Congress may have interpreted such a vote as to some extent indicative of a change in allegiance (356 U. S. at pp. 60-61), apparently inferring this Congressional view from

The dissenting opinions in *Perez* had, on the other hand, emphasized that the citizenship ordained by the Fourteenth Amendment can be abrogated by the Government only if the citizen voluntarily relinquishes it or his conduct manifests a change of allegiance (356 U. S. at pp. 68-69, 75-78, 80, 84). It is the dissenting view that has now become accepted. See *Schneider* v. *Rusk*, 377 U. S. 163, at p. 169 and dissent at pp. 175-176.[4] Save for *Perez*, all of this Court's opinions validating or discussing expatriation, are consistent with this present emphasis.

We shall show below (Point II) that a vote in a foreign political election, per se, has never been treated as indicating a change of allegiance, that it cannot reasonably be so regarded, and that section 401(e) embodied a punitive purpose rather than a judgment on a basic connection between voting and allegiance.

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a report by a committee in the Executive Branch (quoted at 356 U. S. p. 54). In fact, however, the legislative history (*infra*, p. 8), shows that this report was not significant in the enactment of section 401(e).

[4] See also *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 at p. 187 (concurring opinion by Mr. Justice Brennan) and p. 214 (dissenting opinion by Mr. Justice Stewart).

For appraisals of the vitality of *Perez*, see *Tanaka* v. *Immigration & Naturalization Service*, 346 F. 2d 438, 442, n. 3 (C. A. 2, 1965) (dissent); Agata, *Involuntary Expatriation and Schneider* v. *Rusk*, 27 U. Pitt. L. Rev. (1965) 1, 36-47; Kurland, *The Supreme Court-Foreword*, 78 Harv. L. Rev. (1964) 143, 175.

[5] See discussion of cases preceding *Perez*: 356 U. S. at pp. 67-73 (dissent); see also *Perkins* v. *Elg*, 307 U. S. 325, 334: "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance"; *Carlisle* v. *U. S.*, 83 U. S. (16 Wall.) 147, 154; Comment, 56 Mich. Law Rev. (1958) 1142, 1148-1151, respecting similar views expressed in Congressional debate in 1818.

The same principle prevails in international law; see 3 Moore, *Digest of International Law* 306: "(T)he transfer of allegiance must be by a distinctly voluntary act . . . this (is) believed to be the generally recognized rule of international law. . . ."

B. The *Perez* holding, accepting the abrogation of citizenship whenever a "rational nexus" between it and the Government's power over foreign affairs can be posited as possible, represents a unique divergence from Constitutional precepts. This Court has increasingly emphasized that measures affecting basic democratic rights are valid only if narrowly drawn to meet real and substantial public needs. See *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508-509, and cases there cited; *Carrington* v. *Rash,* 380 U. S. 89, 94; *Harman* v. *Forssenius,* 380 U. S. 528, 542.

Surely this criterion is applicable to the right of citizenship, a right explicitly granted in the Constitution and basic to the enjoyment of all other rights,—its abrogation being potentially tantamount to banishment.[6] Compare *United States* v. *Wong Kim Ark,* 169 U. S. 649, 694, declaring that governmental needs could not justify limitation of the right to citizenship guaranteed by the Fourteenth Amendment. In any event, a stringent standard of constitutionality must be applied to section 401(e) because the power over citizenship was here used to curtail the First Amendment right of expression—a right which was not in question in *Perez* (see *Trop* v. *Dulles,* 356 U. S. 86, 106, n. 2. See *infra* p. 15 for First Amendment discussion).

In view of the inconsistency of *Perez* with the pertinent criteria of constitutionality, this Court should grant this petition.

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[6] See *Perez,* 356 U. S. at pp. 64-65, Warren, *C. J.* dissenting. The essential benefit of citizenship is the citizen's right to reside in or return to the territory of his State. I Oppenheim, *International Law* (Lauterpacht, 8th ed., 1958) 646; Borchard, *Diplomatic Protection of Citizens Abroad* (1916) 25; *Worthy* v. *United States,* 328 F. 2d 386, 394 (C. A. 5, 1964).

II—Appraisal of Statute Under the Relevant Criteria

A. Applying the standard evolved by this Court that only acts manifesting a change of allegiance can justify involuntary denationalization, it is clear that section 401(e) is invalid.

1. The history of this provision gives no indication that voting in a foreign political election, without more, can reasonably be taken to manifest a change of allegiance. The only precedent and the direct progenitor for section 401(e) was a bill introduced in 1935 by Representative Dickstein, then chairman of the House Committee on Immigration and Naturalization. It was occasioned by allegations that American citizens of German birth voted in favor of Germany, and thus Nazism, as against France in the plebiscite of January 13, 1935 to determine sovereignty of the Saar.[7] The "Dickstein bill to forfeit the citizenship of American nationals" voting in the plebiscite, was introduced shortly after it.[8]

The House Committee report on the bill when it was reported out, stated that it had been introduced because

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[7] German natives, resident in the United States, returned to the Saar to vote in the plebiscite; whether they were naturalized American citizens or aliens, however, was not disclosed. New York Times for January 6, 1935, p. 20, col. 2. (See *infra* as to reactions to the plebiscite, which negate the *Perez* supposition that voting abroad by Americans might cause embarrassment in our foreign relations.)

[8] New York Times for January 17, 1935, p. 16, col. 2. See 79 Cong. Rec. 2050 (Record for February 15, 1935).

Prior to the plebiscite Rep. Dickstein announced that he would propose a bill "to deprive of citizenship all persons returning from this country to the Saar district to take part in the vote" and that, if the bill was not enacted before their return to this country, he would seek other means to deport them. (New York Times for January 4, 1935, p. 12, col. 3.)

"there is now no law on our statute books which would permit any action leading to cancellation of (the) . . . United States citizenship" of Americans who voted in the plebiscite.[9] The committee was unconcerned with foreign elections generally but with "elections or plebiscites to determine sovereignty over foreign territory." However, it conceived of the bill as a general penalty provision, the report stating:

> "The purpose of the bill is to enact new legislation which will provide the penalty of loss of citizenship and nationality . . . (it is) legislation to serve lawful notice that hereafter citizenship here does not carry with it any loophole through which voting in foreign states may be done without penalty to the citizen so exercising foreign suffrage." [10]

The bill apparently was dropped after it was opposed on the floor of the House on the ground that:

> "If you are going to confer citizenship by judicial process, then the proper thing to do is to divest them of that citizenship by a similar procedure. This bill makes no provision for proof, no provision for giving a man his day in court" (79 Cong. Rec. 2907).

With the approval and at the request of the House Committee on Immigration and Naturalization—chaired by Representative Dickstein during this entire period—a committee was appointed by the President in the Executive Branch to draft a codification of the nationality laws (see 86 Cong.

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[9] House of Representatives Report No. 216, 74th Cong., 1st Sess., on H. R. 5799 (1935) p. 1.

[10] *Ibid.*, at pp. 2-3.

Rec. 11943).. The recommended codification, completed by the President's committee in 1938 and enacted as the Nationality Act of 1940, included the Dickstein proposal as section 401(e). This section was in no sense a codification. The comparison tables show that the only previously existing laws even considered relevant to it were those expatriating American citizens who were naturalized by, or took an oath of allegiance to, a foreign state. See tables, 86 Cong. Rec. 81. However, the Congressional reports and the statements on the floor of Congress by Chairman Dickstein and others, emphasized the codifying function of the bill that became the 1940 Act,[11] and failed to explain—or even mention—the novelty of section 401(e).[12]

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[11] See House Report 2396, 76th Cong. 3rd Sess., p. 1: the bill was a "consolidation and restatement"; to the same effect, 86 Cong. Rec. 11942, 11949; Senate Report 2150, 76th Cong. 3rd Sess., printed at 86 Cong. Rec. 12430; Flournoy, *Nationality Act of 1940* (Contemporary Law Pamphlets, New York Univ. Law School, 1941) p. 5. (Mr. Flournoy was Assistant Legal Adviser to the State Department.)

The enactment clause of the 1940 Act stated: "That the nationality laws of the United States are revised and codified as follows" (54 Stat. 1137).

[12] See 86 Cong. Rec. 11939-11965, 13244-13250.

The report of the President's committee had included the general statements quoted in the *Perez* opinion (356 U. S. at p. 54), without however any supporting analysis or explanation. See Codification of the Nationality Laws of the United States (report by President's Committee, H. R. Print) 76th Cong., 1st Sess., p. 67.

The hearings on the bill, held only in the House, were entitled: "To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code" (Hearings before House Committee on Immigration and Naturalization on H. R. 6127, January-June 1940). There is only brief mention of Section 401(e) in the hearings, Mr. Flournoy stating that the section would be mainly applicable to dual citizens and Representative Dickstein explaining it as applicable to the "Nazis" voting in the Saar plebiscite (pp. 132, 287).

2. Thus, section 401(e) was not a reflection of a considered judgement that a vote in any foreign election manifests a change in allegiance. Not only was there no support for this view but precedent authorities and practice negated it.

American courts had held that American citizens were not expatriated by the "exercise of political rights (abroad) such as voting, under circumstances not indicating any intention to renounce the original allegiance." Borchard, *Diplomatic Protection of Citizens Abroad* (1916) 712 and cases there cited. This conclusion was a corollary of the view that the right to vote in the United States and United States citizenship are not inherently coextensive, though government can control the franchise to make them so. Aliens were for many years and until quite recently permitted to vote here (356 U. S. at pp. 77, 84-85); and on the other hand a person's United States citizenship did not per se entitle him to vote. See *Minor* v. *Happersett,* 88 U. S. (2 Wall.) 162, 170, holding that women, though citizens, were not for that reason entitled to vote.

To infer a citizen's change of allegiance from his casting a vote in a foreign country, is not only contrary to American tradition, but the 401(e) rule is unique in nationality laws throughout the world.[13] Nor is there any corollary

[13] The compendium prepared in 1929 as background for a proposed international codification, shows no law providing for denationalization on the basis of a vote in a foreign election. *Research in International Law, Draft Convention on Nationality* (Harvard Law School, 1929) pp. 100-106. The only country listed in a recent compilation as having such a provision is the United States. *National Legislation Concerning Grounds for Deprivation of Nationality* (Report of United Nations General Assembly, International Law Commission, 5th Sess., 1953) p. 6. And see 356 U. S. at p. 77, n. 39.

principle here or elsewhere that voting in a country's election confers its citizenship.[14]

3. Finally, the inference required to justify section 401(e) is negated by the concept that allegiance is a relationship of depth and permanence[15] and that an individual's "absolute and permanent allegiance to his government or sovereign" is to be distinguished from the "local and temporary allegiance" of an alien to the government of a country in which he resides (*Carlisle* v. *United States*, 83 U. S. (16 Wall.) 147, 154). In view of an alien's temporary allegiance to the government of his place of residence and his subjection to its laws according to basic international principles,[16] an American citizen's interest and participation in the affairs of his habitat abroad to the extent of voting in an election there, is not an unnatural concomitant of his residence.[17] His voting therefore cannot be

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[14] Thus, section 401(e) is contrary to a basic tenet as to citizenship and change of allegiance: "the principle of *continuity*, by which the nationality of origin is retained until a new one is acquired." Borchard, op. cit. *supra*, at p. 19. See also Preuss, *International Law and Deprivation of Nationality*, 23 Georgetown Law Journ. (1934) 250, 255; 356 U. S. at p. 80 (Douglas, *J.*, dissenting in *Perez*).

[15] See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 655-656; Weis, *Nationality and Statelessness in International Law* (1956) 32-35.

[16] See *Wong Kim Ark*, 169 U. S. at pp. 693-694; Borchard, op. cit. *supra* at p. 11.

[17] It may be noted that Section 401(e) applies even to a municipal election [*Bisceglia* v. *Acheson*, 196 F. 2d 865 (C. A. D. C., 1952); see also *Miranda* v. *Clark*, 180 F. 2d 257 (C. A. 9, 1950): "local primary election for city mayor"], and to a vote cast for the purpose of combatting Communism and promoting democracy [see *Acheson* v. *Wohlmuth*, 196 F. 2d 866, C. A. D. C., 1952 (cert. den. 344 U. S. 833); *Acheson* v. *Kuniyuki*, 189 F. 2d 741, reh. den. 190 F. 2d 897 (C. A. 9, 1951) cert. den. 342 U. S. 942].

deemed per se to manifest a withdrawal or transfer of his fundamental allegiance to the United States.

The abrogation of petitioner's American citizenship was based on his voting abroad per se; his voting was unaccompanied by any indication of a change of allegiance. Petitioner voted in the Israeli election openly and avowedly as an American citizen, Israeli law permitting him to do so; and he acquired no other citizenship or status by his participation in the election.

Section 401(e) is equally objectionable as applied to a dual citizen of the United States and of a foreign country, who votes in that country as its citizen. For dual citizenship, recognized and accepted in our law, as it is internationally,[18] "could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other" (*Kawakita* v. *United States*, 343 U. S. 717, 725). If the 401(e) rule was applied by other countries as well as the United States, the dual citizen would be unable to vote anywhere and retain his dual citizenship.

B. Section 401(e) must fall not only because it imposes denationalization absent an act manifesting a change in allegiance, but also because the measure is not narrowly drawn to meet a clear and compelling governmental need.

The justification primarily emphasized in *Perez* for the statute was that the people or government of the foreign country where the American citizen votes, may regard his act of voting as the action of the United States government and that it is therefore "pregnant with the possibility of embroiling this country in disputes with other nations"

[18] I Oppenheim, op. cit. *supra*, at pp. 664-666.

(356 U. S. at pp. 59, 60). The history of the event that stimulated the legislation—the Saar plebiscite—wholly negates the *Perez* hypothesis that American citizen voters may seem to represent this Government's views and embarrass its conduct of foreign affairs.[19] Nor would this inference as to representation be drawn by any foreign government acquainted with diplomatic or democratic usage.[20]

Thus, while problems in connection with our foreign affairs may have engendered the early expatriation legislation codified in the 1940 Act (as stated in *Perez*, 356 U. S. at pp. 48, 56-58), section 401(e)—which was not a codification—cannot be so explained or justified.

Further, as noted by the concurring judge in the Court below (*infra* p. 9a), in a case like petitioner's where the voter's American citizenship is open and avowed and the foreign government authorizes aliens to vote, any possibility of embroilment or embarrassment between the United

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[19] In the reports on the plebiscite there was no hint whatsoever that the 800-odd votes cast by "North American residents" were deemed to represent the views of the United States government. See New York Times for January 16, 1935, p. 12, cols. 3-8; p. 13, cols. 1-6. And our Government apparently experienced no embarrassment or concern in relation to Germany, France, or any other country over any votes that might have been cast by American citizens. Rather, "Satisfaction over the settlement of the Saar problem was expressed . . . by the State Department" (based on the clarity of the choice of the Saarlanders). New York Times for January 16, 1935, p. 12, col. 3; for a similar reaction by the British government, see p. 13, col. 4.

[20] The only reference cited in *Perez* in support of the inference is "Cf. Preuss, International Responsibility for Hostile Propaganda Against Foreign States, 28 Am. J. Int'l L. 649, 650" (356 U. S. at p. 59). The cited page quotes the American rejection in 1885 of a protest by Spain respecting propaganda in the United States against the Spanish government in Cuba.

States government and the foreign government, is removed (to the same effect, see Justice Whittaker's dissent in *Perez*, 356 U. S. at p. 85).[21]

Even if there were support for a fear of possible embarrassment in international relations as a result of Americans voting in foreign elections, section 401(e) would be unjustified. Under the principles developed by this Court, such a speculative and manageable danger does not permit the Government to abrogate a right as fundamental as the right to retain American citizenship, or to deter exercise of the First Amendment right of political expression. Certainly the fact that opinion is expressed in canalized form through casting of a ballot, does not lessen First Amendment protection.

The other ground proposed in *Perez* as justification for section 401(e) is that "The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government" (356 U. S. at p. 59). If this means, as it seems to, that Congress can in the conduct of foreign affairs curtail the right of American citizens to support a policy contrary to the Administration's, it posits a rationale inconsistent with the First Amendment. The First Amendment precludes Congressional suppression of dissent from the Administration's foreign policy, whether on foreign or American soil. (See discussion in District Court opinion, *infra* p. 16a; Justice

[21] The *Perez* suggestion of "problems of protection" of American citizens abroad (356 U. S. at p. 57) likewise seems unreal as applied to a citizen lawfully voting in a foreign country. But in any event, administrative practice with respect to protection abroad is not a significant consideration as to citizenship and expatriation, since such protection is discretionary. *Mandoli* v. *Acheson*, 344 U. S. 133, 137, note 8.

Douglas' dissent in *Perez*, 356 U. S. at pp. 81-82; compare *Kent* v. *Dulles*, 357 U. S. 116, 130; *Aptheker* v. *Secretary of State*, 378 U. S. 500, 517.)

C. Since section 401(e) was not in its genesis or effect related to the conduct of foreign affairs, but instead reflected a punitive and retributive purpose, the reasoning of *Trop* v. *Dulles*, 356 U. S. 86, and *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (especially pp. 180-184), should be applied to invalidate it.

III—Restriction of Perez Holding

This Court should grant this petition to consider whether, in the event *Perez* is not overruled, it should be limited in a manner making it inapplicable to petitioner, as suggested by the concurring judge in the Court below (*infra* p. 8a).

CONCLUSION

It is respectfully submitted that this petition should be granted.

Respectfully submitted,

NANETTE DEMBITZ
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New York, N. Y. 10010
Attorney for Petitioner

August, 1966

APPENDIX

Judgment of Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-four day of May one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,

Circuit Judges.

BEYS AFROYIM,

Plaintiff-Appellant,

—v.—

DEAN RUSK, as Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Opinion of Court of Appeals for the Second Circuit

Before: WATERMAN, KAUFMAN and ANDERSON, *Circuit Judges.*

WATERMAN, *Circuit Judge:*

Plaintiff commenced a declaratory judgment action in the United States District Court for the Southern District of New York challenging the constitutionality of 8 U. S. C. §1481(a)(5). He alleged that the section is both unconstitutional on its face and as applied to him in that it violates the due process guarantee of the Fifth Amendment and violates Section 1, Clause 1 of the Fourteenth Amendment.

After cross-motions for summary judgment had been filed by both parties, the court below in a reasoned opinion, reported at 250 F. Supp. 686 (S. D. N. Y. 1966), granted the motion filed by the defendant Secretary of State and dismissed plaintiff's complaint on the ground that there was no genuine issue as to any material fact and that the Secretary was entitled to judgment as a matter of law.

Plaintiff, who had been a naturalized citizen of the United States, had suffered the loss of that citizenship on November 14, 1960, on the ground that he had expatriated himself on July 30, 1951, when he had voluntarily voted in an Israeli parliamentary election.[1]

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[1] Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746; 8 U. S. C. (1946 ed.) §801 provides:

> §801. General means of losing United States nationality.
>
> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *

(Footnote continued on next page)

The court below handed down its order upon a stipulation of the parties which set forth the material facts:

"1. Plaintiff, who was born in Poland in 1893, emigrated to the United States in 1912. Plaintiff under the name of Ephraim Bernstein, also known as Beys Afroyim, became a naturalized citizen by order of this Court on June 14, 1926.

"2. On July 30, 1951 plaintiff voted in the elections for the second Knesset, the Parliament of the State of Israel.

"3. The election for the second Knesset was a political election in a foreign state within the contemplation of Section 401(e) of the Nationality Act of 1940.

"4. Plaintiff voluntarily voted in the said election.

"5. Plaintiff contends that neither at the time of the election nor at any other time did he have any intention or desire to lose or abandon his American citizenship. Plaintiff also contends that he considered himself at all times an American citizen with allegiance to the United States. Defendant will not stipulate with respect to the truthfulness of these allegations. Defendant also maintains that these allegations are irrelevant since a specific intent or desire to lose or abandon American citizenship is not a requisite for expatriation under Section 401(e) of the Nationality Act of 1940.

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory.

This provision of the Nationality Act of 1940 was preserved in the Immigration and Naturalization Act of 1952, Ch. 477, Title III, ch. 3, Section 349(a)(5), 66 Stat. 267; 8 U. S. C. §1481(a)(5).

"6. On November 14, 1960 the American Vice Consul at Haifa, Israel, issued a Certificate of Loss of Nationality to plaintiff on the ground that he expatriated himself on July 30, 1951 under Section 401(e) of the Nationality Act of 1940 by voting in a political election in a foreign state. The Vice Consul's action was approved by the Passport Office of the Department of State on January 4, 1961. Plaintiff on January 27, 1965 appealed to the State Department's Board of Review on the Loss of Nationality, and on May 3, 1965 the Board affirmed the Vice Consul's determination."

In his brief upon appeal appellant claims the statute violates the First, Sixth, and Eighth Amendments as well as the Fifth and Fourteenth; the First because Congress has sought by the Act to impose a drastic sanction upon a citizen's freedom to express his opinion on political, social or economic issues, and the Sixth and Eighth because the statute appears to have a punitive ring to it and the safeguards guaranteed by the Sixth to one charged with crime are not made available to one who may suffer, as did this appellant, a claimed "unusual punishment" barred by the Eighth.

We are of course bound by the authority of *Perez* v. *Brownell*, 356 U. S. 44 (1958) wherein a native-born American citizen who voted in a Mexican political election, and who had lost his citizenship thereby, sought to have the U. S. Supreme Court hold that the predecessor statutory provision here challenged was beyond the power of Congress to enact—and wherein the constitutionality of the legislation was upheld.

Appellant contends that subsequent decisions of the Court have so devitalized *Perez* that its holding is no longer a

binding precedent. Our attention is directed as evidence of this claimed devitalization to the case of *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963), which held, as to the citizens involved, 8 U. S. C. §1481(a)(10), a different provision of 8 U. S. C. §1481(a) from the one before us here, unconstitutional. However, the result reached in *Perez* was not affected by *Mendoza-Martinez,* see the opinion for the Court, 372 U. S. 144, at 162-163, the reservations of concurring Justices, pp. 186, 187, and the statement for the dissenting Justices, pp. 202, 203.

Also, we are asked to consider the result the Court reached in *Schneider* v. *Rusk,* 377 U. S. 163 (1964) as also indicative of a weakening of the *Perez* authority. However, at 166-167 of the Court's opinion, written by a *Perez* dissenter, there is a careful explanation of the specific ground upon which *Schneider* was distinguished from *Perez.*

We are even urged to disregard *Perez* because of the holding in a case contemporaneously decided, *Trop* v. *Dulles,* 356 U. S. 86 (1958). In *Trop,* on the facts there, the Court held that 8 U. S. C. §401(g), now 8 U. S. C. §1481(a)(8), again a different provision from 8 U. S. C. §1481(a)(5), was as to *Trop* an unconstitutional enactment while at the same time holding 8 U. S. C. §401(e) constitutional. The thrust of this argument is that the Court in *Perez* did not appear to consider that a denaturalization might be a punishment though the Court had that in mind in *Trop,* decided the same day.

Subsequent to all of the Supreme Court cases cited to us and set forth *supra,* we have, within the year, recognized in *Tanaka* v. *INS,* 346 F. 2d 438 (2 Cir. 1965), the binding authority of *Perez.* We said there:

> "It is not open to question that the voluntary act of voting in a foreign election in 1950 results in expatriation under §401(e) of the Nationality Act of 1940, the constitutionality of this provision having been expressly affirmed in Perez v. Brownell, 356 U. S. 44, 78 S. Ct. 568, 2 L. Ed. 2d 603 (1958). However, no conduct results in expatriation unless *it is voluntary.* Nishikawa v. Dulles, 356 U. S. 129." (Emphasis supplied.) 346 F. 2d 438, 441.

Admittedly, as stipulated in this case, appellant's participation in the Israeli election was voluntary. Moreover, no claim is made on appeal that appellant has acquired Israeli citizenship and can therefore be claimed to have dual nationality.

We affirm the judgment below on the authority of *Perez* v. *Brownell, supra,* and *Tanaka* v. *INS, supra.*

The exposition by the court below of the present posture of the issues that were decided by the Court in *Perez* was exhaustive and most penetrating, and we adopt as the rationale for our own opinion the following language in the opinion below at 690:

> "Suffice it to say that *Perez,* read as a whole, holds that the Constitution does not deny Congress the power to prevent American citizens from engaging in the processes of political decision in a foreign state, regardless of whether our government is interested one way or another in the specific outcome of the election or interested only in maintaining an appearance of circumspect neutrality. *Perez* confirmed a Congressional power to determine that the formulation of sensitive political decisions vitally important to a foreign state—and in-

directly affecting the international community at large —should properly be conducted without the participation of American citizens."

Affirmed.

KAUFMAN, *Circuit Judge* (concurring):

I feel constrained to concur—albeit reluctantly. In *Tanaka* v. *Immigration & Naturalization Service,* 346 F. 2d 438 (2d Cir. 1965) (dissenting opinion), I expressed grave doubt as to whether the Supreme Court's opinion in *Perez* v. *Brownell,* 356 U. S. 44 (1958) retained vitality. And, I questioned there whether *Perez* was not to be limited to its facts in the face of the Court's subsequent holdings in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963) and *Schneider* v. *Rusk,* 377 U. S. 163 (1964). I am still of the view that the Supreme Court's opinion in *Perez,* a bare majority of one ruling, should be narrowly construed and strictly confined to its facts until that Court is asked to review its interpretation of Section 401(e) of the Nationality Act of 1940,* an event which I believe is inevitable in light of the series of perplexing denationalization opinions rendered by the Supreme Court in its 1963 term. See Kurland, *The Supreme Court 1963 Term—Forward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,* 78 Harv. L. Rev. 143, 169-175 (1964). And, it is not of little interest that Justice Brennan, a member of the five-to-four *Perez* majority subsequently expressed his own "doubts of the correctness of

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* This provision has been carried forward as Section 349(a)(5) of the Immigration and Naturalization Act of 1952.

Perez, which I joined." *Kennedy* v. *Mendoza-Martinez, supra* at 187.

Furthermore, the *ratio decidendi* of *Perez* is not persuasive when applied to the instant facts. I see no reason why an individual who performed the act of voting in a foreign election, after full disclosure of his American ties should be visited with such severe consequences as loss of citizenship and the deportation which will inevitably follow, without a showing that his voting somehow impeded or interfered with the conduct of this country's foreign affairs. Such interference was the "rational nexus" which Mr. Justice Frankfurter found so essential in *Perez* and which is wholly missing here.

I lean to the view that if Afroyim had not expressly stipulated the facts of his case so as to bring it squarely within the ambit of *Perez,* the result here might have been different. To illustrate, the administrative record discloses that unlike *Perez* who did not reveal his American citizenship to the Mexican authorities when he voted there, Afroyim presented his identification booklet—a document which described him as an American citizen—to the Israeli election officials. Thus, Israeli authorities, knowing of Afroyim's American citizenship, would seem to have openly ignored any objection that country might have had to a non-Israeli voting in its elections. It is fair to infer from this that any risk of embarrassment to this country's relationship with Israel by reason of the involvement of Afroyim in Israel's internal affairs was thus removed.

However, in light of the stipulation in this case and because the majority of two panels of this Court believes that *Perez* has not become moribund, I concur reluctantly, as I have already indicated, in the result reached in the majority opinion.

Opinion, Judgment, and Order of District Court

BRYAN, *District Judge:*

In this declaratory judgment action plaintiff, who has lost his American citizenship under § 401(e) of the Nationality Act of 1940, 8 U. S. C. § 1481(a)(5), challenges the constitutionality of that section.

While it does not appear whether plaintiff was within the United States when the action was commenced, there is jurisdiction in any event. If he was, this court has jurisdiction under § 360(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1503(a). If he was not, this court has jurisdiction under § 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, as implemented by the Declaratory Judgment Act, 28 U. S. C. § 2201. See Rusk v. Cort, 369 U. S. 367 (1962).

Both parties have cross-moved for summary judgment on stipulated facts pursuant to Rule 56(a), (b), F. R. C. P.

Plaintiff was born in Poland in 1893, and emigrated to the United States in 1912. He became a naturalized citizen in this court on June 14, 1926.

Some time during 1950 the plaintiff emigrated to Israel. He resided there some ten years, pursuing his profession as an artist. By his residence in Israel plaintiff apparently has acquired Israeli citizenship, though the parties have not argued the question here. There has been no claim by the plaintiff that the deprivation of his American citizenship will render him a stateless person.

On November 14, 1960, in preparation for a return to this country, plaintiff applied to the United States Consulate in Haifa for a passport. His application was rejected, and the American Vice Consul issued a Certificate

of Loss of Nationality to plaintiff on the ground that he had expatriated himself on July 30, 1951, by casting a ballot in a political election in a foreign state in contravention of § 401(e).[1] The Vice Consul's action was approved by the Passport Office of the Department of State on January 4, 1961. Plaintiff appealed to the State Department's Board of Review on the Loss of Nationality which affirmed the Vice Consul's determination on May 3, 1965. This action followed.

Throughout the administrative proceedings plaintiff contended that he had never voted in an election of the State of Israel, but only entered the polling place to sketch the voters as they cast their ballots. Before this court, however, it is stipulated that on July 30, 1951, plaintiff voted in the elections for the Second Knesset, the Parliament of the State of Israel. And it is agreed that he did so voluntarily.[2]

Plaintiff contends that at no time did he intend to abandon his American citizenship. Defendant refuses to stipulate that this allegation is true or false, but urges that in any event it is immaterial for purposes of deciding the case at bar.

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[1] 8 U. S. C. § 1481(a)(5) reads as follows: "From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

* * * * *

"(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory;

* * * * *."

[2] The effect of this stipulation is to remove the oft-litigated issue of duress from the case at bar. See, e.g., Tanaka v. Immigration & Naturalization Service, 346 F. 2d 438 (2 Cir. 1965); Takehara v. Dulles, 205 F. 2d 560 (9 Cir. 1953); Acheson v. Kuniyuki, 189 F. 2d 741 (9 Cir. 1951), *cert. den.*, 342 U. S. 942 (1953); Doreau v. Marshall, 170 F. 2d 721 (3 Cir. 1948).

It has been said with good reason that the "[v]iews of the Justices have varied when it comes to the problem of expatriation." Schneider v. Rusk, 377 U. S. 163, 166 (1964). Under these circumstances the task of a District Court, charged with applying the law as declared by the Supreme Court of the United States, is not without its difficulties.

The decision in Perez v. Brownell, 356 U. S. 44 (1958), is directly called into question by the plaintiff in the case at bar. There the Supreme Court by a 5-4 vote squarely upheld the constitutionality of § 401(e) as a proper incident of the power of Congress to regulate foreign affairs; the statute was applied—despite Fifth and Fourteenth Amendment objections—to a natural born American citizen who had voted in political elections in Mexico. Plaintiff candidly concedes that *Perez* would be controlling here, were it not, as he urges, that the vitality of that decision has been so completely undermined by subsequent cases that it no longer has the force of law. I am fully conversant with the speculation to the effect that the Supreme Court in recent years has *sub silentio* overruled *Perez*,[3] but in my view that case is still a precedent binding on this court.

The issue posed by Justice Frankfurter in *Perez*—and restated as the controlling question by Justice Douglas in the recent case of Schneider v. Rusk, *supra* at 166—is whether "the means, withdrawal of citizenship, [is] reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrass-

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[3] See, e.g., Tanaka v. Immigration & Naturalization Service, 346 F. 2d 438, 447-48 n. 3 (2 Cir. 1965) (Kaufman, J., dissenting); Agata, Involuntary Expatriation and Schneider v. Rusk, 27 U. Pitt. L. Rev. 1 (1965); Kurland, Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government, 78 Harv. L. Rev. 143 (1964).

ment in the conduct of our foreign affairs." 356 U. S. at 60. In *Perez* the court answered that question in the affirmative as to § 401(e), finding that it was the "possession of American citizenship" that made the act of voting in a foreign political election "potentially embarrassing to the American government and pregnant with the possibility of embroiling this country in disputes with other nations." *Ibid.* It was therefore held that Congress could provide for termination of citizenship so as to eliminate the problem.

Perez also flatly rejected the contention that a person, voting abroad in a foreign political election, must intend to give up his citizenship before it may be taken away. Whether § 401(e) requires a purposeful abandonment of citizenship is simply a matter of statutory interpretation which is closed in this court by the *Perez* decision.[4] In any event, Justice Frankfurter's interpretation is supported by the intent and the plain meaning of the statute as well as by precedent.[5] And it is sustained by reason. Indeed, if, as *Perez* holds, it is the foreign affairs power which supports deprivation of citizenship under § 401(e), then Congress quite justifiably can attach a loss of citizenship for voting in a foreign political election without regard to the

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[4] Certainly it cannot be said that intent must necessarily be included as an element of § 401(e) in order to save its constitutionality. There is even a serious question as to whether the Constitution in any significant degree forbids *criminal* punishment for unintentional conduct. See Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57 (1910); Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107. Much less would it prohibit the application of § 401(e)—which is non-penal in nature, see pp. 8-9 *infra*—to an actor who was unaware of the consequences of his conduct.

[5] E.g., Savorgnan v. United States, 338 U. S. 491 (1950); Mackenzie v. Hare, 239 U. S. 299 (1915); Acheson v. Kuniyuki, 189 F. 2d 741 (9 Cir. 1951), *cert. den.* 342 U. S. 942 (1952).

voter's intent. It is the "possession of American citizenship" by the voter, not the state of his mind, which poses a hazard to the conduct of our international relations. For example, participation by Americans in the plebiscite to determine sovereignty over the Saar—activity which was the immediate catalyst for the passage of § 401(e)—did not hamper the conduct of foreign affairs any the less because some of those voting may have had no intention of abandoning their American citizenship.

Since *Perez* is direct authority against plaintiff on the question presented here, the function of this court is only to determine whether the vitality of that decision has survived. The four Justices who dissented in *Perez* joined in the opinion of the Court in Trop v. Dulles, 356 U. S. 86 (1958), which held unconstitutional a statute denationalizing any citizen who had been convicted of desertion by a court-martial. One Justice concurred on a separate ground. Four others dissented. Unconstitutionally, in the opinion of the Court, rested upon: (1) a total inability of Congress to effectuate a deprivation of citizenship except on voluntary renunciation, and (2) the cruel and unusual punishment clause of the 8th Amendment. Neither factor has significance here.

As to the first ground, the view that Congress is incapable of accomplishing involuntary expatriation has simply "not yet commanded a majority of the entire Court." Schneider v. Rusk, *supra* at 166. The second ground in *Trop*, the cruel and unusual punishment clause, is inapplicable to the case at bar because § 401(e) is non-penal in nature. Justice Frankfurter concluded in *Perez* that the statute was designed to prevent intentional or unwitting interference with the foreign relations of the United States by an

American citizen abroad. The purpose of the statute, he held, was regulation, not punishment.

It was for this reason that the mere casting of a ballot in a foreign political election—conduct on its face quite harmless or even commendable—was deemed to be sufficient to trigger the drastic and irremediable sanction of forfeiture of citizenship. Thus *Trop* cannot be said to undermine *Perez*. It is not open for plaintiff to contend here that § 401(e) is in essence a penal law passed in a spirit of vindictiveness, and must satisfy constitutional standards more stringent than those applied in *Perez*.

The holding in *Perez* that § 401(e) is non-penal in nature also distinguishes the present case from the two decisions in Kennedy v. Mendoza-Martinez, 372 U. S. 44 (1963). The Supreme Court there invalidated §§ 401(j) and 349(a)(10) of the Nationality Act of 1952 "because in them Congress [had] plainly employed the sanction of deprivation of nationality as a punishment—for the offense of leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the 5th and 6th Amendments." *Id.* at 165-66. *Perez*, however, was considered by the Court to be distinguishable because § 401(e) was supported by "legislative history totally different from that underlying §§ 401(j) and 349(a)(10)." *Id.* at 164; see *id.* at 170 n. 30. Thus the reservation in *Mendoza-Martinez*, rather than the decision, is instructive here.

In addition to contending that *Perez* has been in effect overruled by recent cases, plaintiff directly assails the reasoning of that decision. He attacks the wisdom—and even the rationale—of a statute which presumes that an American citizen by merely voting in a foreign political election could involve this country in international diffi-

culties. He challenges the conclusion in *Perez* that "the citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government," 356 U. S. at 59, because any citizen may do that simply by voting in this country for a candidate who turns out badly or by exercising his rights of free speech at home or abroad. Plaintiff seeks to discount any danger in the possibility that the "people or government of the foreign country may regard [the voter's] action" to be a "reflection if not an expression" of the policy of the United States, *ibid.*, because the same likelihood obtains whenever an American citizen abroad expresses his views on any matter of political import.

Plaintiff's attacks upon § 401(e) and upon these isolated observations in the *Perez* opinion are not wholly unpersuasive. But in the delicate field of constitutional adjudication a court is not called upon to pass on the wisdom or the efficacy of a statute; the question is only "whether or not Congress may have concluded not unreasonably that there is a relevant connection between [the] fundamental source of power and the ultimate legislative action." *Id.* at 58. *Perez* found a sufficient connection. It is not within the province of this court to overrule that conclusion. Suffice it to say that *Perez,* read as a whole, holds that the Constitution does not deny Congress the power to prevent American citizens from engaging in the processes of political decision in a foreign state, regardless of whether our government is interested one way or another in the specific outcome of the election or interested only in maintaining an appearance of circumspect neutrality. *Perez* confirmed a Congressional power to determine that the formulation of sensitive political decisions vitally important to a for-

eign state—and indirectly affecting the international community at large—should properly be conducted without the participation of American citizens.

Beyond this, Congress might well conclude that a citizen's voting abroad constituted conduct "inconsistent with undiluted allegiance to this country." Kennedy v. Mendoza-Martinez, *supra* at 214 (Stewart, J., dissenting). As was said in Acheson v. Wohlmuth, 196 F. 2d 866, 870 (D. C. Cir.) *cert. den.*, 344 U. S. 833 (1952):

> "the intent of Congress in the Nationality Act was to attach the consequence of loss of citizenship to conduct which substantially evidences allegiance to a government existing in a territory other than our own * * *. When we come to consider the meaning of Section 401(e) as a whole, it becomes apparent that Congress there sought to distinguish between acts performed in the interest of maintaining our own governmental institutions and acts which tend to support or implement institutions other than our own."

Thus, if it is now the law that Congress may effectuate a withdrawal of the precious rights of citizenship only upon conduct evincing something less than full allegiance to this country, compare Schneider v. Rusk, *supra* at 168 (Douglas, J.), with *id.* at 178 (Clark, J., dissenting), then § 401(e) satisfies that test. Indeed, the suggestion in *Perez* that in the opinion of Congress voting in a foreign political election could import "allegiance to another country" in some measure "inconsistent with American citizenship," 356 U. S. at 61, might well be the source of the doctrine which apparently gained a consensus of the Justices in *Schneider*.

In my view the authority of *Perez* v. *Brownell* still stands and is controlling here. This conclusion is in full

accord with the decisions of the Second Circuit in which the vitality of *Perez* was at least collaterally challenged. Tanaka v. Immigration & Naturalization Service, 346 F. 2d 438 (2 Cir. 1965); United States ex rel. Marks v. Esperdy, 315 F. 2d 673 (2 Cir. 1963), aff'd by an equally divided court, 377 U. S. 214 (1964). See also Rocha v. United States, 351 F. 2d 523 (1 Cir. 1965), petition for cert. filed, 34 U. S. L. Week 3272 (U. S. Jan. 10, 1966).

Defendant's motion for summary judgment is granted. Plaintiff's oral cross-motion for the same relief is denied. Judgment will be entered accordingly.

It is so ordered.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM, PETITIONER

v.

DEAN RUSK, AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and concurring opinions of the court of appeals (Pet. App. 3–9; R. 14–21)[1] are reported at 361 F. 2d 102. The opinion of the district court (Pet. App. 10–18; R. 2–11) is reported at 250 F. Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1966 (Pet. App. 1–2; R. 22). The petition for a writ of certiorari was filed on August 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the Appendix to petitioner's brief in the court of appeals.

231-556—66

STATUTE INVOLVED

Section 401 of the Nationality Act of 1940, 54 Stat. 1168, as amended, 58 Stat. 746, 8 U.S.C. 801 (1946 ed.), provided in pertinent part:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory * * *.[2]
>
> * * * * *

QUESTION PRESENTED

Whether this Court should reconsider its decision in *Perez* v. *Brownell*, 356 U.S. 44, which held that the Constitution empowers Congress to provide that a person who voluntarily votes in a political election in a foreign state shall lose his American citizenship.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit affirming the determination of the district court that he had lost his American citizenship under Section 401(e) of the Nationality Act of 1940, as amended, by virtue of having voluntarily voted in a political election in the State of Israel. The facts, which were stipulated in the district court (R. 12–13) are as follows.

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[2] Section 401(e) was reenacted as Section 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 267–268, 8 U.S.C. 1481(a)(5).

Petitioner was born in Poland in 1893. He emigrated to the United States in 1912 and became a naturalized American citizen in 1926. On July 30, 1951, he voluntarily voted in the elections for the Second Knesset, the Parliament of the State of Israel.[3] The stipulation recites that this was a political election in a foreign state within the contemplation of Section 401(e). On November 14, 1960, the American Vice Consul at Haifa, Israel, issued a Certificate of Loss of Nationality to petitioner. This action was approved by the Passport Office of the Department of State on January 4, 1961, and on May 3, 1965, by the State Department Board of Review.

ARGUMENT

In *Perez* v. *Brownell,* 356 U.S. 44, this Court sustained the validity of Section 401(e) against broad-ranging constitutional challenge, as applied to a native-born American having dual American-Mexican citizenship who had voluntarily voted in a political election in Mexico. The Court found the provision rationally related to the foreign affairs power of Congress and further deemed the act of voting in a foreign political election to be in some measure inconsistent with a

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[3] Petitioner contends that neither at the time of the election nor at any other time did he intend to abandon his American citizenship and that he considered himself at all times an American citizen and does so now. Respondent refused to stipulate to the truthfulness of these contentions, maintaining that they were irrelevant to the question of loss of citizenship under Section 401(e) "since a specific intent or desire to lose or abandon American citizenship is not a requisite for expatriation under Section 401(e) of the Nationality Act of 1940" (R. 12).

claim of American citizenship. The Court said (356 U.S. at 60-61):

> The critical connection between this conduct [voting in a foreign political election] and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

Petitioner argues that subsequent decisions of this Court teach that denationalization is only proper where predicated upon an act signifying a dilution or change of allegiance (Pet. 6). However that may be, voting in a foreign political election is such an act; Congress was entitled to find that it imports significant elements of allegiance to the foreign country in question which are inconsistent with undivided allegiance to the United States. Compare *Savorgnan* v. *United States*, 338 U.S. 491, where this Court upheld the denationalization of a woman who took an oath of allegiance to a foreign country even though she had no intention by that act to renounce her American citizenship. The decisions on which petitioner relies involved

no such question and took pains to distinguish *Perez*. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164; *Schneider* v. *Rusk*, 377 U.S. 163, 166–167. In *Mendoza-Martinez*, the statute in question denationalized persons who had gone abroad to evade military service. See, also, *Trop* v. *Dulles*, 356 U.S. 86. This was not conduct which imported an allegiance to a foreign country. In *Schneider* the statute in question denationalized naturalized citizens who resided in the country of their origin for three years, and this Court held that the statute discriminated impermissibly between native-born and naturalized citizens.[4]

CONCLUSION

There is no persuasive reason for this Court to re-examine its considered and relatively recent ruling in *Perez* v. *Brownell*, 356 U.S. 44. Accordingly, the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
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Attorneys.

SEPTEMBER 1966.

[4] Petitioner's First Amendment argument is, we believe, unsound. There is no constitutional right to participate in the political processes of a foreign state.

U.S. GOVERNMENT PRINTING OFFICE: 1966

MEMORANDUM

Supreme Court, U.S.
FILED
SEP 23 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM,

Petitioner,

—v.—

DEAN RUSK, as Secretary of State,

Respondent.

MEMORANDUM SUPPLEMENTAL TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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The following statistics, received from the Department of State since the filing of the petition herein, demonstrate the ongoing impact of the expatriation provision at bar, on the Fourteenth Amendment guarantee of citizenship.

"There follows a table showing the number of United States citizens who have been administratively held by the Department to have lost citizenship under Section 401(e) of the Nationality Act and Section 349(a)(5) of the Immigration and Nationality Act during the five year period 1961 through 1965.

	Sec. 401(e)	Sec. 349(a)(5)
1961	845	783
1962	544	471
1963	395	750
1964	306	402
1965	365	515
	2,455	2,921

During the first six months of this calendar year the Department determined that 167 citizens of the United States had lost citizenship under Section 401(e) of the Nationality Act and 258 others had become expatriated under Section 349(a)(5) of the Immigration and Nationality Act."

(Letter to Petitioner's attorney from Robert D. Johnson, Deputy Director, Passport Office, dated September 7, 1966, in reply to request for information for use in instant case.)*

Respectfully submitted,

NANETTE DEMBITZ
Attorney for Petitioner

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* Indicative of the human components contributing to the foregoing figures is a recent news item: "Mrs. Bruce Lepper, formerly of Closter, N. J., and now wife of an English student . . . tells in London of plight. She voted in British elections in March, after being assured by a British election officer that her voting would not prejudice her national status. But U. S. Embassy says voting probably has cost her citizenship." (New York Times for August 9, 1966, p. 12, col. 4.)

FILED
DEC 17 1966
JOHN F. DAVIS, CLERK

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BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM,

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DEAN RUSK, as Secretary of State,

Respondent.

BRIEF FOR PETITIONER

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 250 F. Supp. 686 (reproduced at R. 3). The opinion of the United States Court of Appeals for the Second Circuit is reported at 361 F. 2d 102 (reproduced at R. 13).

Jurisdiction

The petition for writ of certiorari was granted on October 24, 1966 (R. 20). The jurisdiction of this Court rests on 28 U. S. C., Section 1254(1).

Statute Involved

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746, 8 U. S. C. (1946 ed.) §801, provided:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . .

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

This provision was reenacted as section 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U. S. C. §1481(a)(5).

Questions Presented for Review

1. Whether the statutory provision depriving an American citizen of his citizenship on the basis that he has voted in a foreign political election is invalid under the Fourteenth Amendment to the United States Constitution and the due process guarantee of the Fifth Amendment because such a vote in itself cannot reasonably be deemed to manifest an abandonment or dilution of allegiance to the United States.

2. Whether the provision is invalid under those Amendments because it imposes a loss of citizenship without sufficient justification in public need, and whether it is likewise invalid under the First Amendment because it unjustifiably restricts freedom of expression.

3. Whether the provision is invalid under the Fifth, Sixth and Eighth Amendments because it violates the safeguards provided by those Amendments with respect to the imposition of punishment.

Statement of the Case

Petitioner's complaint sought a declaratory judgment that section 401(e) of the Nationality Act of 1940, on its face and as applied to him, is unconstitutional and that he therefore retains his United States citizenship. The District Court judgment, affirmed by the Court of Appeals (R. 19), granted defendant-respondent's motion for summary judgment and denied plaintiff-petitioner's (R. 10).

The facts are undisputed and appear in the complaint, a stipulation of the parties, and an exhibit submitted by respondent at the District Court hearing.

Petitioner was born in Poland in 1893, emigrated to the United States in 1912, and became an American citizen by naturalization in 1926 (R. 11). In 1950, pursuing his profession as an artist, he went to Israel. In preparation for his return to the United States to reside here and continue his profession, he applied in 1960 to a United States Vice-Consul in Israel for the renewal of his American passport. His application was rejected on the ground that he had cast a ballot in an election in 1951 for the Israeli Knesset, the legislative body of Israel, and that he had thereby lost his American nationality pursuant to section 401(e) of the Nationality Act of 1940. The Vice-Consul's action was affirmed by the State Department's Board of Review on the Loss of Nationality (R. 11-12).

According to the stipulation, petitioner voluntarily voted in the 1951 election, and it constituted a political election in a foreign state within the meaning of section 401(e). Petitioner asserted in the complaint and stipulation that neither at the time of the election nor at any other time

did he intend or desire to lose or abandon his American citizenship and that he considered himself at all times an American citizen with allegiance to the United States. Respondent did not stipulate as to these assertions, maintaining that they are irrelevant (R. 11).

At the Israeli election in 1951, petitioner exhibited his Israeli identification booklet to an Israeli official at the polling-place. The booklet specified that petitioner was solely an American citizen (R. 2).

Summary of Argument

I.

A. In *Perez* v. *Brownell*, 356 U. S. 44, upholding section 401(e), the chief dissenting opinion expressed the principle that American citizenship can be abrogated by the Government only if the citizen voluntarily renounces it or his conduct manifests an abandonment of allegiance. Even if this Court declines to accept this principle in full, despite its historical and doctrinal support, the majority of the Court seems already to have recognized the danger of the *Perez* doctrine that expatriation is valid whenever Congress could have concluded not unreasonably that it bears a relevant connection with a governmental purpose. Opinions since *Perez* indicate that the act on which Congress predicates expatriation must manifest at the least a dilution of allegiance to this country.

B. The legislative history of section 401(e), together with precedents and principles relating to allegiance—both national and international—demonstrate that an American citizen's voting in a foreign political election cannot

be deemed in itself to signify a dilution of his fundamental allegiance to the United States. Because of the rationale of *Perez*, this issue was undecided and considered only parenthetically therein.

II.

A. Assuming *arguendo* that the Government can denationalize a citizen in the absence of his renunciation or abandonment of allegiance, the expatriation measure must be narrowly tailored to meet a compelling public need. Section 401(e) fails to satisfy this Constitutional criterion.

The only justification suggested for this expatriation provision is the danger of embarrassment in the conduct of this country's foreign relations. The international embarrassment to which expatriation legislation was historically directed, was a function of conflicting claims to an individual's allegiance and services—a problem which is not involved in section 401(e). Because the danger of embarrassment from a citizen's vote in a foreign election is, from all standpoints, highly improbable and speculative, it is insufficient to justify this broad and drastic provision for expatriation.

B. By the same token—because the only justification suggested for section 401(e) is a speculative, improbable, and in any event manageable danger—it violates the First Amendment's guarantee of free expression. The First Amendment limits the power of Congress to inhibit the expression of opinion by American citizens outside as well as inside our borders. And the expression of political opinion remains within the Amendment's protection, although it takes the crystallized form of voting.

III.

Since section 401(e) neither in genesis nor effect has served any purpose other than punitive, it is invalid because it fails to afford the safeguards provided by the Constitution with respect to the imposition of punishment.

ARGUMENT

I.

The expatriation provision is invalid under the Fourteenth and Fifth Amendments, because a vote by an American citizen in a foreign political election cannot reasonably be deemed in itself to manifest an abandonment or dilution of allegiance to the United States.

A. *Congress cannot abrogate American citizenship unless the citizen's act manifests an abandonment, or at least a dilution, of allegiance.*

The court below felt constrained to follow the ruling in *Perez* v. *Brownell,* 356 U. S. 44, upholding the denationalization provision here in issue, although the concurring judge pointed out that there is "grave doubt" as to that decision's vitality (R. 17).

The *Perez* rationale was that a statute imposing expatriation is valid whenever "Congress may have concluded not unreasonably that there is a relevant connection" between the content of a governmental power and the deprivation

of citizenship (356 U. S. at p. 58). Because of this basis for the decision, the majority only gave parenthetical consideration to the question of whether voting by an American citizen in a foreign election can reasonably be deemed to import a withdrawal of his allegiance to the United States.[1]

The principal dissenting opinion in *Perez* had, on the other hand, emphasized that the citizenship ordained by the Fourteenth Amendment can be abrogated by the Government only if the citizen voluntarily renounces it or his conduct manifests an abandonment of allegiance (356 U. S. at pp. 68-69, 76, 78).

Petitioner will not presume to recapitulate the reasoning of the dissenting Justices, rejecting the majority's attribution to Congress of a sweeping power to expatriate American citizens [the dissenting position was summarized in *Trop* v. *Dulles*, 356 U. S. 86, 92; *Nishikawa* v. *Dulles*, 356 U. S. 129, 138-139 (Justice Black concurring); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 162]. Suffice it to say that the dissenting position seems to effectuate the basic concept of the Government of the United States as the organ and agent of the community of individuals guaranteed citizenship by the Fourteenth Amendment. And the concomitant view—that Congress can predicate expatriation only on an act manifesting a renunciation, transfer, or abandonment of allegiance—seems likewise grounded in the bedrock of

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[1] See 356 U. S. at pp. 60-61, referring to a Congressional view on this issue, which apparently was inferred from a report by a committee in the Executive Branch on the proposed 1940 Act (quoted at 356 U. S. p. 54). For the legislative history, indicating that this report failed to reflect the viewpoint of Congress, see *infra*, pp. 9-12.

fundamentals and of history. When the concept of perpetual allegiance was supplanted by the principle of voluntary expatriation, the new doctrine meant that nationality "is supposed to cease whenever the subject or citizen renounces the old and assumes a new allegiance". H. R. Doc. No. 326, 59th Cong., 2d Sess. (1906) p. 12; see also p. 162.[2]

Even if the Court does not now fully accept the dissenting position as to the criteria of an expatriating act, the majority of the Court seems already to have recognized the danger of the *Perez* doctrine of a comprehensive Congressional authority to impose expatriation in aid of any governmental purpose. Opinions since *Perez* seem to have adopted the view that the act on which Congress predicates expatriation must at the least show a dilution of allegiance to this country (see *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 214, Justice Stewart dissenting; compare pp. 187-188, Justice Brennan concurring; see *Schneider* v. *Rusk,* 377 U. S. 163, 168-169; compare p. 176, Justice Clark's dissent).

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[2] See also Tsiang, The Question of Expatriation in America Prior to 1907 (1942) 101-102; 3 Moore, Digest of International Law (1906) 303, 306; *Comitis* v. *Parkerson,* 56 Fed. 556, 559-561 (Cir. Ct. E. D. La., 1893). A basic tenet as to citizenship is "the principle of *continuity,* by which the nationality of origin is retained until a new one is acquired." Borchard, Diplomatic Protection of Citizens Abroad (1916) p. 19. See also Preuss, *International Law and Deprivation of Nationality,* 23 Georgetown Law Journ. (1934) 250, 255.

B. *An American citizen's vote in a foreign political election cannot reasonably be deemed to manifest a dilution of allegiance to the United States nor, a fortiori, its abandonment.*

1. Legislative history of section 401(e).

Nothing in the history of this expatriation provision supports the view that an American citizen's voting abroad can be deemed to show a diluted allegiance to the United States.

The only precedent and the direct progenitor for section 401(e) was a bill introduced in 1935 by Representative Dickstein, who was then chairman of the House Committee on Immigration and Naturalization and continued in that position through the enactment of 401(e). The bill was occasioned by allegations that American citizens of German birth voted in favor of Germany, and thus Nazism, as against France in the plebiscite of January 13, 1935 to determine sovereignty of the Saar.[3] The "Dickstein bill to forfeit the citizenship of American nationals" voting in the plebiscite, was introduced shortly after it.[4]

The House Committee report on the bill stated that it had been introduced because "there is now no law on our statute

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[3] German natives, resident in the United States, returned to the Saar to vote in the plebiscite; whether they were naturalized American citizens or aliens, however, was not disclosed. New York Times for January 6, 1935, p. 20, col. 2.

Prior to the plebiscite, Rep. Dickstein announced that he would propose a bill "to deprive of citizenship all persons returning from this country to the Saar district to take part in the vote" and that, if the bill was not enacted before their return to this country, he would seek other means to deport them. (New York Times for January 4, 1935, p. 12, col. 3.)

[4] New York Times for January 17, 1935, p. 16, col. 2; see 79 Cong. Rec. 2050.

books which would permit any action leading to cancellation of (the) . . . United States citizenship" of Americans who voted in the plebiscite.[5] While the Committee was primarily concerned with "elections or plebiscites to determine sovereignty over foreign territory," it conceived of the bill as a general penalty provision, stating:

> "The purpose of the bill is to enact new legislation which will provide the penalty of loss of citizenship and nationality . . . (it is) legislation to serve lawful notice that hereafter citizenship here does not carry with it any loophole through which voting in foreign states may be done without penalty to the citizen so exercising foreign suffrage." [6]

The bill was dropped after it was opposed on the floor of the House on the ground that:

> "If you are going to confer citizenship by judicial process, then the proper thing to do is to divest them of that citizenship by a similar procedure. This bill makes no provision for proof, no provision for giving a man his day in court" (79 Cong. Rec. 2907).

At the request of the House Committee on Immigration and Naturalization, still chaired by Representative Dickstein, a committee was appointed by the President in the Executive Branch to draft a codification of the nationality laws (see 86 Cong. Rec. 11943). The recommended codification, completed by the President's committee in 1938 and enacted as the Nationality Act of 1940, included the Dickstein proposal as section 401(e).

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[5] House of Representatives Report No. 216, 74th Cong., 1st Sess., on H. R. 5799 (1935) p. 1.

[6] *Ibid.*, at pp. 2-3.

This section was in no sense a codification. The comparison tables show that the only previous laws considered at all relevant to it were those expatriating American citizens who were naturalized by, or took an oath of allegiance to, a foreign state. See tables, 86 Cong. Rec. 81. However, the Congressional reports and statements by Chairman Dickstein and others emphasized the codifying function of the bill that became the 1940 Act, and failed to explain—or even mention—the novelty of section 401(e).[7]

In a report in 1950 on a bill to ameliorate some of the hardships inflicted by section 401(e), a House subcommittee concurred in the view quoted above from the 1935 report, that the purpose of this expatriation provision is to impose a penalty on citizens voting abroad (H. R. No. 1469, 81st Cong. 2d Sess., 1950, p. 9).

In sum, there is no indication in the legislative history of a view, or of facts to support a view, that a vote in a foreign political election in itself signifies a change in allegiance.

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[7] See House Report 2396, 76th Cong. 3rd Sess. p. 1; Senate Report 2150, 76th Cong. 3rd Sess., printed at 86 Cong. Rec. 12430; 86 Cong. Rec. 11939-11965, 13244-13250, esp. 11942, 11949; Flournoy, *Nationality Act of 1940* (Contemporary Law Pamphlets, New York Univ. Law School, 1941) p. 5. (Mr. Flournoy was Assistant Legal Adviser to the State Department.)

The enactment clause of the 1940 Act stated: "That the nationality laws of the United States are revised and codified as follows" (54 Stat. 1137).

The hearings on the bill, held only in the House, were entitled: "To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code" (Hearings before House Committee on Immigration and Naturalization on H. R. 6127, January-June 1940). There is only brief mention of section 401(e) in the hearings: the Deputy Commissioner of Immigration stated that in some countries aliens are permitted to vote (p. 99); Mr. Flournoy said the section would be mainly applicable to dual citizens (pp. 98, 132); and Chairman Dickstein explained it in terms of Americans voting in the Saar plebiscite (pp. 286-287).

Rather, the history reflects concern primarily for a special form of election—a plebiscite—and a desire to impose a penalty.

It is true that the committee in the Executive Branch that drafted the 1940 statute, explained section 401(e) in terms that rationalized it with the committee's general declared purpose of imposing expatriation on those lacking a "real attachment" to the United States.[8] However, the codification committee's declaration as to a connection between a vote in a foreign political election and allegiance,[9] is unsupported by any analysis or precedent and ignores the fact that the provision merely had a punitive genesis. As a justification for an imposition of statelessness, moreover, the committee's *ipse dixit* seemed to carry little persuasiveness even at the time, since the State Department's expert on the bill apparently viewed 401(e) as explicable only in relation to dual citizens, with their vote indicative of a choice of their foreign nationality.[10]

2. No precedent or principle to support inference of change in allegiance.

There is no precedent or principle either in American or international law to support treatment of a vote in a foreign election as in itself an expatriating act or a manifestation of diluted allegiance to the country of nationality.

On the few occasions that the question arose in American courts, they held that American citizens were not expatri-

[8] See Codification of the Nationality Laws of the United States (report by President's Committee, H. R. Print), 76th Cong., 1st Sess., p. VII, quoted in *Perez*, 356 U. S. at p. 53.

[9] Ibid. at p. 67; quoted in *Perez*, 356 U. S. at p. 54.

[10] See citation to Mr. Flournoy's testimony, *supra* note 7.

ated because of their "exercise of political rights (abroad) such as voting, under circumstances not indicating any intention to renounce the original allegiance". Borchard, *Diplomatic Protection of Citizens Abroad* (1916) 712 and cases there cited. Rulings to the same effect were made in the Executive Branch. Tsiang, *op. cit. supra* note 2, at p. 102. Likewise, no inference of a change of allegiance was drawn, apparently, from a vote by an alien in an election in this country, throughout the years when such voting was permitted (see 356 U. S. at pp. 77, 84-85).

Conversely, a person's United States citizenship did not *per se* entitle him to vote. See *Minor* v. *Happersett,* 88 U. S. (2 Wall.) 162, 170, holding that women were not entitled to vote by reason of their citizenship.

> "The courts almost unanimously have denied that the two (right of suffrage and citizenship) had any necessary connection and have held that not only might persons who are not citizens exercise the elective franchise (citation), but that citizens as such were not entitled to vote (citing cases)." H. R. Doc. No. 326, 59th Cong., 2d Sess. (1906) p. 46.

Thus, voting in a political election has not been treated in American law or custom as either a manifestation or a necessary corollary of allegiance. Looking outside our borders, the 401(e) rule is unique in expatriation laws throughout the world, both past and present.[11] And, as in

[11] The compendium prepared in 1929 as background for a proposed international codification, shows no law providing for denationalization on the basis of a vote in a foreign election. *Research in International Law, Draft Convention on Nationality* (Harvard Law School, 1929) pp. 100-106. The only country listed in a recent

American law, there seems to be no doctrine anywhere that voting in a country's election in itself confers its citizenship.

In sum, section 401(e) sprang exclusively from Representative Dickstein's innovative and punitive 1935 bill.

3. Inconsistency of inference with basic concepts of allegiance.

The inference required to justify section 401(e) is negated by the concept that a citizen's fundamental and enduring allegiance to his national government is to be distinguished from the "local and temporary allegiance" of an alien to the government of a country in which he resides.[12] In view of such "temporary allegiance" and the alien's subjection to the laws of his place of residence, according to unvarying national and international doctrine,[13] an American citizen's interest and participation in the affairs of his habitat abroad to the extent of voting in an election there, is not an unnatural concomitant of his residence.[14]

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compilation as having such a provision is the United States. *National Legislation Concerning Grounds for Deprivation of Nationality* (Report of United National General Assembly, International Law Commission, 5th Sess., 1953) p. 6. And see 356 U. S. at p. 77, n. 39.

[12] *Carlisle* v. *United States*, 83 U. S. (16 Wall.) 147, 154.

[13] See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 693-694; Borchard, op. cit., *supra*, p. 13, at p. 11; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356; Weis, *Nationality and Statelessness in International Law* (1956) 32-35.

[14] Section 401(e) applies even to a municipal election [*Bisceglia* v. *Acheson*, 196 F. 2d 865 (C. A. D. C. 1952); see also *Miranda* v. *Clark*, 180 F. 2d 257 (C. A. 9, 1950): "local primary election for city mayor"]; to a vote for "Commissar of the Agrarian Community" under the Mexican agricultural program [*Matter of R*_____ *R*_____, 3 I. & N. Dec. 890 (1950)]; to a vote in a local option determination on the sale of wine and beer, though it was designated

If voting by an American citizen is permitted by the foreign country in which he resides, his use of the privilege is indeed congenial to the tradition of political interest and expression nurtured in his sovereign country—the United States.[15]

4. State Department's view.

In explanation of a State Department ruling that an American citizen, a Mrs. Lepper, retained her citizenship despite her vote in a British general election, the Department stated:

> "The Department's administrative decision was that Mrs. Lepper had not lost United States citizenship under Section 349(a)(5) of the Immigration and Nationality Act by having voted in British General Elections on March 31, 1966. Only British subjects and

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by a local official as non-political. [*Matter of F*....., 2 I. & N. Dec. 427 (1946)]; and to a vote cast for the purpose of combatting Communism and promoting democracy [see *Acheson* v. *Wohlmuth*, 196 F. 2d 866, C. A. D. C. 1952 (cert. den. 344 U. S. 833); *Acheson* v. *Kuniyuki*, 189 F. 2d 741, reh. den. 190 F. 2d 897 (C. A. 9, 1951) cert. den. 342 U. S. 942].

[15] The inference that a vote abroad in itself signifies a change in allegiance, is inconsistent with common understanding. See H. R. No. 1469, 81st Cong. 2d Sess., 1950, p. 10, as to the unawareness of numerous American citizens, voting in various Italian elections, that their citizenship might be affected. Of the 5,376 American citizens denationalized in the years 1961 through 1965 because of their votes in foreign elections (see figures in Petr's. Memo. Suppl. to Pet. for Cert.), doubtless many were similarly unaware.

The enactment of numerous bills to relieve citizens from the effect of expatriation under section 401(e) (*Ibid.* at p. 4; and Pub. Law 114, c. 321, 81st Cong. 1st Sess.) bears out the conclusion (*supra*, p. 11) that Congress itself does not regard a vote abroad as necessarily a manifestation of diluted allegiance.

citizens of the Irish Republic were eligible to vote in the elections. Mrs. Lepper was neither a British subject nor a citizen of the Irish Republic and it was concluded by this Department that her vote was invalid under British law. In such circumstances, it is the Department's position that expatriation does not result." [16]

The State Department's ruling indicates that it does not regard a vote in a foreign election as expatriative because it manifests diluted allegiance to the United States, for from that standpoint the legality of the vote seems irrelevant.

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[16] Letter to Petitioner's attorney dated Oct. 19, 1966, from Robert D. Johnson, Deputy Director, Passport Office. The letter continued:

"Mr. Afroyim was of course eligible to vote in the elections for the Second Knesset of the State of Israel on July 30, 1951. There was no Israeli nationality status prior to April 1, 1952 . . ."

The Immigration and Naturalization Service seems to differ with the State Department, and holds that a vote cast in a foreign political election expatriates though it is invalid under the foreign law. *Matter of N*——, 3 I. & N. Dec. 829 (1950).

The two departments also differ on what elections should be deemed "political". See *Matter of Lyons*, 10 I. & N. Dec. 68, 69 (1962).

5. Violation of citizenship guarantee of Fourteenth Amendment and due process guarantee of Fifth Amendment.

History, principle and practice thus demonstrate that an American citizen's voting in a foreign political election cannot be deemed *per se* to signify a dilution of his fundamental allegiance to the United States. It may be true, as the dissenting Justices in *Perez* themselves observed, that under special circumstances his vote may so signify.[17] However, section 401(e) is a blanket and all-encompassing provision. And the abrogation of petitioner's American citizenship was based on his voting abroad *per se*. There was no finding or evidence that his voting was accompanied by any indication of a change in allegiance. Petitioner voted in the Israeli election openly and solely as an American citizen, Israeli law permitting him to do so; and he acquired no other citizenship or status by his participation in the election.[18]

Because voting abroad does not in itself manifest diluted allegiance, section 401(e) not only violates the guarantee

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[17] For example, a dual citizen's vote in a foreign country as a foreign citizen might raise a problem of allegiance to the United States, particularly if accompanied by a disclaimer of American citizenship. However, in evaluating this problem it must be borne in mind that dual citizenship, recognized and accepted in our law as it is internationally, "could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other" (*Kawakita* v. *United States*, 343 U. S. 717, 725). If the 401(e) rule was applied by other countries as well as the United States, the dual citizen would be unable to vote anywhere and retain his dual citizenship.

[18] Respondent recognizes that Israeli citizenship was created subsequent to the election at which petitioner voted. The right to vote in the 1951 election for the Knesset was based on residence rather than nationality. Warsoff, *Citizenship in Israel*, 33 N. Y. U. Law Rev. (1958) 857, 857.

of citizenship of the Fourteenth Amendment, but also the due process guarantee of the Fifth Amendment. Congress cannot, for the sake of administrative convenience, decree a blanket abrogation of citizenship on a ground irrelevant to allegiance, in order to encompass special situations which might furnish relevant grounds.[19]

Section 401(e) further violates the due process guarantee, in that it makes no provision for notice to the citizen that his innocuous act will result in a grave loss. Voting in a foreign election is not innately blameworthy so that a citizen would have reason to apprehend some dire consequence,[20] nor was it under national or international practice and custom attended by a loss of citizenship. Under these circumstances, even assuming *arguendo* that expatriation under section 401(e) is not deemed a penalty (see Point III *infra*), we believe due process requires actual warning to the citizen of his peril. Cf. *Lambert* v. *California*, 355 U. S. 225; *Morisette* v. *United States*, 342 U. S. 246.[21]

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[19] Compare *Harmon* v. *Forssenius*, 380 U. S. 528, 542.

[20] See note 15 *supra*.

[21] See 3 Moore, Digest of International Law (1906) 303, quoting Secretary of State Webster's statement in 1852: "'Change of allegiance . . . ought always to be accomplished by proceedings which are understood on all sides to have that effect . . .'"

Petitioner's expatriation because his vote was valid, while those casting invalid votes retain their American citizenship (*supra*, p. 16), is irrationally discriminatory and thus further violative of due process.

II.

The expatriation provision violates the Fourteenth Amendment, the due process guarantee of the Fifth Amendment, and the First Amendment because it imposes loss of citizenship and restricts freedom of expression without sufficient justification in public need.

A. *Violation of Fourteenth and Fifth Amendments.*

A deprivation so "profoundly destructive" of personal rights as expatriation,[22] is justifiable only if imposed by a measure carefully limited to meet a compelling public need. Expatriation, except as an effectuation by the Government of a citizen's deliberate renunciation or transfer of allegiance, must meet the most stringent constitutional test. Abrogation of a right explicitly guaranteed by the Fourteenth Amendment is intolerable on a lesser justification than infringement of a First Amendment right or other basic liberties.[23]

We submit that section 401(e) is unconstitutional under the standard of review here applicable, nor indeed does it even satisfy the minimum test—a rational basis.

Perez, seeking a rationale for 401(e), inferred "in light of the historical background of expatriation in this country," that Congress acted under its power over foreign affairs and to avoid embarrassment in their conduct (356 U. S. at

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[22] *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 188 (Justice Brennan concurring).

[23] See *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508, and cases there cited; compare *United States* v. *Wong Kim Ark,* 169 U. S. 649, 694.

pp. 57-60). However, the international embarrassments and frictions to which expatriation provisions were historically directed, related to "conflicting claims" to an individual's allegiance or services (356 U. S. at p. 50).[24] In contrast, section 401(e) applies to persons who are solely American citizens and to an act—the act of voting in a foreign country, which neither confers that country's citizenship (see *supra*, p. 14) nor is a source of "conflicting claims". The embarrassments with which expatriation was historically concerned, are thus irrelevant to section 401(e).

Nor is there any basis for attributing to Congress in section 401(e) an intent to prevent embarrassments in foreign affairs. None of the reports or statements in explanation of 401(e) or its 1935 progenitor give any hint of an apprehension of international embarrassment because of Americans voting abroad (see *supra*, pp. 9-12); and we need not consider whether such prevention was a purpose of any previous enactment since 401(e) was not a codification (see *supra*, p. 11).

Further, the history of the event that stimulated this provision—the Saar plebiscite—wholly negates the *Perez* hypothesis that Americans voting abroad may appear to represent this Government's views and thus embarrass its

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[24] The purpose of early expatriation rulings, treaties and legislation was to deal with problems of dual nationality and transfer of allegiance. See Note, The Expatriation Act of 1954, 64 Yale Law Journ. (1955) 1164, 1173-4; Tsiang, *op. cit., supra* n. 2, at pp. 88-90, 112. Both *Mackenzie* v. *Hare*, 239 U. S. 299, and *Savorgnan* v. *United States*, 338 U. S. 491, involved these problems. Judicial reference to "embarrassment" in foreign relations as the justification for expatriation legislation seems to have originated in *Mackenzie* (see 239 U. S. at p. 312).

conduct of foreign affairs.[25] Nor would this inference as to representation be drawn by any foreign government acquainted with diplomatic or democratic usage.[26] Further, the fact that no other country has found it necessary to adopt legislation like 401(e) (see *supra*, p. 13) also indicates the unreality of the *Perez* supposition of international embarrassment.

Finally, as indicated by the concurring judge in the court below (R. 18), in a case like petitioner's, where the voter's American citizenship is open and avowed and the foreign government authorizes aliens to vote, any possibility of embroilment or embarrassment between the United States government and the foreign government is removed (to the same effect, see Justice Whittaker's dissent in *Perez*, 356 U. S. at p. 85).[27]

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[25] In the reports on the plebiscite there was no hint whatsoever that the 800-odd votes cast by "North American residents" were deemed to represent the views of the United States government. See New York Times for January 16, 1935, p. 12, cols. 3-8; p. 13, cols. 1-6. And our Government apparently experienced no embarrassment or concern in relation to Germany, France, or any other country over any votes that might have been cast by American citizens. No such factor figured in its reactions to the plebiscite. Rather, "satisfaction over the settlement of the Saar problem was expressed . . . by the State Department" (based on the clarity of the choice of the Saarlanders). New York Times for January 16, 1935, p. 12, col. 3; for a similar reaction by the British government, see p. 13, col. 4.

[26] The only reference cited in *Perez* in support of the inference is "Cf. Preuss, International Responsibility for Hostile Propaganda Against Foreign States, 28 Am. J. Int'l L. 649, 650" (356 U. S. at p. 59). The cited page notes that a government is not responsible internationally for acts of private citizens, and quotes the American rejection in 1885 of a protest by Spain respecting propaganda in the United States against the Spanish government in Cuba.

[27] Cf. the State Department's construction of the voting provision as applicable only to a lawful vote, *supra*, p. 16.

The *Perez* suggestion of "problems of protection" of American citizens abroad (356 U. S. at p. 57) likewise seems unreal as applied

Accordingly, we submit that section 401(e) lacks rational connection with the congressional power over foreign affairs or any other power. But assuming *arguendo* that there is some possibility of international embarrassment through Americans voting in foreign elections, surely it is not a sufficient danger to warrant this drastic expatriation measure. *Perez* suggests that expatriation is an effective method of handling the supposed embarrassment because "the termination of citizenship terminates the problem" (356 U. S. at p. 60). Thus, justification for expatriation rests at best on the slim difference in efficacy between this Government's statement that the individual is no longer an American citizen and a statement that in his political views he is not controlled by, and does not represent this Government.[28]

Both the Fourteenth Amendment and the Fifth Amendment's due process guarantee are violated by the abrogation of citizenship for such a speculative, slim advantage to the public as that posited in *Perez*. The right of citizenship is more precarious and insubstantial than the Fourteenth Amendment intended if it can be so casually abrogated.

B. *Violation of First Amendment.*

The casting of a ballot is an expression of political opinion; crystallization in the form of a vote does not, we suggest, remove expression from the protection of the First Amendment. Cf. *Harper* v. *Virginia State Board of*

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to a citizen lawfully voting in a foreign country. In any event, protection of citizens abroad is discretionary, and is not a significant consideration with respect to citizenship and expatriation. *Mandoli* v. *Acheson*, 344 U. S. 133, 137, note 8.

[28] See statement to Government of Spain, cited *supra* note 25.

Election, 383 U. S. 663, 665. Further, the Bill of Rights protects American citizens outside as well as inside our borders against action by this Government. See *Reid* v. *Covert,* 354 U. S. 1, 5-6, 8-9.

Since the purpose and effect of section 401(e) is to deter expression of political opinion through voting in a foreign election, it violates the First Amendment because it is not justified by a clear and serious public danger. See discussion of First Amendment tests in *Dennis* v. *United States,* 341 U. S. 494, 502-511. For the only ground consonant with the Government's Constitutional powers suggested in justification for section 401(e), is the highly speculative—and in any event manageable—danger of embarrassment in the conduct of foreign affairs.

Perez explains section 401(e) in part on the basis that by voting in a foreign election "The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government" (356 U. S. at p. 59). If this means, as it seems to, that Congress can, in the conduct of foreign affairs, curtail the right of American citizens to support a policy contrary to the Administration's, it posits a rationale inconsistent with the First Amendment.[29] The First Amendment precludes a Congressional effort to inhibit dissent from the Administration's foreign policy, whether on foreign or American soil. (See District Court opinion, R. 8; Justice Douglas' dissent in *Perez,* 356 U. S. at pp. 81-82; compare *Kent* v. *Dulles,* 357 U. S. 116, 130; *Aptheker* v. *Secretary of State,* 378 U. S. 500, 517.)

[29] The effect of 401(e) on First Amendment rights was not considered in *Perez.* See *Trop* v. *Dulles,* 356 U. S. 86, 106, n. 2 (Justice Brennan concurring).

III.

The statute is invalid under the Fifth, Sixth and Eighth Amendments because it violates the safeguards provided by those amendments with respect to the imposition of punishment.

Section 401(e) originated in a punitive and retributive purpose; both in origin and effect it is unconnected with a regulatory objective (*supra*, pp. 12, 22). The reasoning of *Trop* v. *Dulles*, 356 U. S. 86, and *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (especially pp. 180-184), should therefore be applied to invalidate it.

Particularly because 401(e) applies to one who is solely an American citizen, and thus imposes statelessness, there is no doubt that it inflicts a harsh deprivation (see *Mendoza-Martinez*, 372 U. S. at p. 161).[30]

The fact that the provision involves no moral wrong or act deserving of punishment does not gainsay the actuality of a punitive purpose and the lack of regulatory objective.[31] Indeed, the failure of 401(e) to provide for notice that the

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[30] Statelessness is, among other things, homelessness. An essential benefit of citizenship is the citizen's right to reside in or return to the territory of his State. I Oppenheim, *International Law* (Lauterpacht, 8th ed., 1958) 646; Borchard, *Diplomatic Protection of Citizens Abroad* (1916) 25; *Worthy* v. *United States*, 328 F. 2d 386, 394 (C. A. 5, 1964).

Figures are unavailable on how many of the hundreds of individuals denationalized yearly because of voting abroad (see *supra* note 15 for statistics) are excluded from the United States and how many deported; Perez himself was under a deportation order (356 U. S. at p. 47).

[31] It may be noted that in countries without our Constitutional restrictions, expatriation is used as punishment. See Roche, The Expatriation Cases, 1963 Supreme Court Review 325, 334.

innocuous act of voting will be visited by a grave penalty is an additional due process objection to the section (see *supra*, p. 18).

CONCLUSION

It is respectfully submitted that the judgment below should be reversed and the provision for expatriation of an American citizen on the basis of his voting in a foreign political election should be held unconstitutional.

Respectfully submitted,

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December 1966

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM, PETITIONER

v.

DEAN RUSK, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and concurring opinions of the court of appeals (R. 12–19) are reported at 361 F. 2d 102 and 105. The opinion of the district court (R. 3–10) is reported at 250 F. Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1966 (R. 19). The petition for a writ of certiorari was filed on August 18, 1966, and was granted on October 24, 1966 (R. 20). The jurisdiction of this Court rests upon 8 U.S.C. 1254(1).

STATUTE INVOLVED

Section 401(e) of the Nationality Act of 1940, as amended, 54 Stat. 1137, 1168–1169, 58 Stat. 746, 8 U.S.C. 801 (1946 ed.), provided in pertinent part:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory * * *[1]
>
> * * * * *

QUESTION PRESENTED

Whether Congress acted within its constitutional power in providing that a person shall lose his American nationality by voluntarily voting in a political election in a foreign state.

STATEMENT

Petitioner was born in Poland in 1893; he emigrated to the United States in 1912 and became a naturalized American citizen in 1926 (R. 11). He went to Israel in 1950, and, on July 30, 1951, he voluntarily voted in the election for the Second Knesset, the national parliament of Israel. The stipulation filed in the district court recites that this was a political election in a foreign state within the meaning of Section 401(e) of the Nationality Act of 1940 (R. 11).[2] Petitioner's

[1] Section 401(e) was reenacted (with certain additions not here material) as Section 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U.S.C. 1481 (a)(5).

[2] The stipulation further sets out petitioner's claims that, neither at the time of the Israeli election nor at any other time, did he desire or intend to abandon or lose his American citizenship and that he has considered himself at all times an American citizen. Respondent refused to stipulate to the truthful-

Israeli identification booklet indicates that he also voted in the elections for the Third and Fourth Knessets, in 1955 and 1959, and in municipal elections in those years (R. 1–2).

On November 14, 1960, the American Vice Consul at Haifa, Israel, issued a Certificate of Loss of Nationality to petitioner on the ground that he had expatriated himself by voting in the Israeli political election on July 30, 1951. This action was approved by the Passport Office of the Department of State on January 4, 1961, and, on May 3, 1965, by the State Department Board of Review (R. 11–12).

Petitioner then brought this action for a declaratory judgment in the United States District Court for the Southern District of New York, challenging the constitutionality of Section 401(e). The district court upheld the administrative determination under the authority of *Perez* v. *Brownell,* 356 U.S. 44 (R. 3–10), and the court of appeals affirmed (R. 12–19).

SUMMARY OF ARGUMENT

In *Perez* v. *Brownell,* 356 U.S. 44, this Court upheld the constitutionality of the provision involved in this case, stating that the measure was a reasonable exercise of the congressional power in the field of foreign relations and that the provision properly denoted an act reflecting a dilution of allegiance to this country. Petitioner contends that this Court's later expa-

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ness of these subjective contentions, maintaining that they were irrelevant to the question of loss of citizenship "since a specific intent or desire to lose or abandon American citizenship is not a requisite for expatriation under Section 401(e) of the Nationality Act of 1940" (R. 11).

triation decisions have indicated that the latter criterion is the controlling one. Whatever the soundness of this analysis, we submit that *Perez* should not be overruled, because Section 401(e) satisfies both criteria.

A. In enacting Section 401(e), Congress believed that involvement in the political processes of a foreign state by voting in a political election constituted an act of allegiance to that state inconsistent with allegiance to this country. Viewed in terms of the kind of election involved in this case, this was a rational judgment. An American citizen who (as here) votes in a nationwide election for a foreign legislature commits himself to the foreign state as a political entity.

A vote in such an election evinces a significant degree of involvement in the processes and policies of the foreign government. In addition, such a vote—a solemn and wholly voluntary act—may reasonably be interpreted by our legislature as a symbolic act of commitment to the processes and institutions of a foreign state inconsistent with allegiance to this country.

B. Additionally, as held in *Perez,* Congress could reasonably conclude that voting in a foreign political election has the potential of creating friction not only between this country and the nation in which the voting takes place, but with other countries as well. As this Court pointed out in *Perez,* and as the realities of the present international scene confirm, it is no idle possibility that by voting in a foreign election a citizen may cause serious international problems for this country. Whether for propaganda purposes or otherwise, foreign nations may view such political activity

on the part of American citizens, even if lawful in the state where the voting occurs, as the expression of official American positions. By terminating citizenship the moment that the voting occurs, Congress has adopted the most effective means of obviating that problem.

C. Petitioner's contention that the Section 401(e) violates First Amendment guarantees is patently unsound. To be sure, voting, like taking an oath of allegiance to a foreign state or formally renouncing American citizenship, is an act of political expression. However, the First Amendment does not bar a reasonable congressional judgment that the loss of American citizenship should attach to such acts.

ARGUMENT

CONGRESS HAS THE CONSTITUTIONAL POWER TO TREAT VOTING IN A FOREIGN STATE AS AN EXPATRIATING ACT

In 1958, this Court in *Perez* v. *Brownell,* 356 U.S. 44, sustained the constitutional power of Congress to provide (as it did in Section 401(e) of the Nationality Act of 1940)[3] that an American citizen, whether naturalized or native born, shall lose his citizenship by voting in a political election in a foreign state. In so ruling, the Court relied on the congressional power over foreign affairs, finding that a rational nexus existed between that "fundamental source of power and the ultimate legislative action" (356 U.S. at 58). In addition, the Court noted that the act of voting in a foreign political election was conduct inconsistent

[3] This is now, in substance, Section 349(a)(5) of the Immigration and Nationality Act of 1952.

with claims of American citizenship. The Court stated its rationale as follows (356 U.S. at 60–61):

> The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

This Court's more recent expatriation decisions have neither overruled *Perez* nor, as one commentator has contended, rendered it "moribund."[4] On the contrary, the Court has been careful in each of these later cases[5] to distinguish the issues there involved

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[4] See Kurland, Foreword: *Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 Harv. L. Rev. 143, 174, see also p. 168 (1964).

[5] See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 162, 164, and *Schneider* v. *Rusk*, 377 U.S. 163, 166–168. Obviously, *Trop* v. *Dulles*, 356 U.S. 86, decided the same day as *Perez*, may not be fairly considered as having implicitly overruled *Perez*. In *Marks* v. *Esperdy*, 377 U.S. 214, decided the same

and the rulings there made from *Perez*. And it is clear that the view espoused in the dissents in *Perez* (356 U.S. at 62, 79, 84)—*i.e.*, that Congress lacks power to adopt denaturalization legislation except as to activity which "invariably involves a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship" (356 U.S. at 75)—"has not yet commanded a majority of the entire Court." *Schneider* v. *Rusk*, 377 U.S. 163, 166.

Petitioner argues (Pet. Br. 8), however, that there has been a shift of emphasis in the Court's decisions subsequent to *Perez* from the first factor relied on there—a rational nexus between foreign voting and embroilment or embarrassment in the conduct of our foreign affairs—to the second—dilution of allegiance. He argues that, unless an act evinces a dilution of allegiance to this country, whatever its consequences in our foreign relations may be, it may not be deemed an act of expatriation. We do not take issue with this analysis because, even if it represents an accurate reading of the Court's decisions, it does not require the overruling of *Perez*. As we shall show, voting in a political election in a foreign state evinces a sufficient degree of commitment to that state (and a concommitant dilution of American allegiance) to justify the congressional decision to classify such voting as an expatriating act. In addition, the statute meets the constitutional requirements of due process because

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day as *Schneider* v. *Rusk*, *supra*, a finding of denationalization for having served in a foreign army (Section 349(a)(3) of the Immigration and Nationality Act of 1952) was affirmed, *per curiam*, by an equally divided Court.

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of the clear connection between foreign voting and the congressional power in the field of foreign affairs.

A. VOTING IN A POLITICAL ELECTION IN A FOREIGN STATE IS CONDUCT WHICH CONGRESS COULD RATIONALLY DEEM TO BE INCONSISTENT WITH CLAIMS OF AMERICAN CITIZENSHIP

1. Contrary to petitioner's contention (Pet. Br. 9–12), when Congress adopted Section 401(e), it did so, in large measure, because it felt voting by American citizens in a political election in another country was conduct inconsistent with unswerving fealty to this nation. This proposition is borne out by the legislative history detailed in *Perez* v. *Brownell, supra,* 356 U.S. at 48–57. We do not repeat that history here, except to note that the Cabinet Committee [6] (whose recommendation that Section 401(e) be adopted was accepted by Congress) made clear that it viewed foreign voting as an act of commitment to a foreign country. The report (printed in Hearings before the House Committe on Immigration and Naturalization, 76th Cong., 1st Sess. (1940) p. 491) stated in part:

> Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the

[6] The Committee was established by President Roosevelt in 1933, at the request of the House Committee on Immigration and Naturalization and was composed of various members of the Cabinet. Its recommendations for revision and codification of then existing nationality laws provided the basis for the Nationality Act of 1940 (See *Perez*, *supra*, 356 U.S. at 52–53).

> United States, whether or not the person in question has or acquires the nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.

While discussion of the purpose of Section 401(e) at hearings before the House Committee (the Senate held no hearings) was sparse, it was in the same vein (See Hearings, *supra,* pp. 132, 286–287; *Perez,* 356 U.S. at 55). The fact that congressional debate did not focus on this provision is hardly a realistic basis for refusing to attribute to Congress the view of the Cabinet Committee. "It is clear that, as is so often the case in matters affecting the conduct of foreign relations, Congress was guided by and relied very heavily upon the advice of the Executive Branch, and particularly the State Department * * *. In effect, Congress treated the Cabinet Committee as it normally does its own committees charged with studying a problem and formulating legislation." *Perez,* 356 U.S. at 56. As Mr. Justice Frankfurter concluded (*id.* at 57) "[t]he legislators, counseled by those on whom they rightly relied for advice, were concerned about actions by citizens in foreign countries that create problems of protection and *are inconsistent with American allegience.*" (Emphasis added.)

Petitioner cursorily dismisses the pertinent views of the committee primarily responsible for the statute in question and relies instead on the fact that an earlier proposed statue providing for denationalization for

voting in a foreign election (introduced in the House of Representatives in 1935) was referred to in Congress as a "penalty." See H. Rep. No. 216, 74th Cong., 1st Sess., p. 1; 79 Cong. Rec. 2050. But it is significant to note that this 1935 House Report also spoke of foreign voting as evincing a "divided loyalty" and stated that a citizen who "becomes so much interested in the affairs of a foreign state as to voluntarily vote abroad" does not "hold United States citizenship so dear" (H. Rep. No. 216, 74th Cong., 1st Sess., p. 2). The notion that Section 401(e) is "penal" is merely another form of the argument, rejected in *Perez,* that the provision does not represent a proper regulatory objective; it does not advance the argument, but merely provides a label for a conclusion. See *Trop* v. *Dulles,* 356 U.S. 86, 94 (opinion of Warren, C.J.).[7] What emerges from the legislative history, therefore, is the fact that Congress, in passing this statute, did so in the expressed belief that it was denoting an act indicative of diluted allegiance.

2. It was reasonable, we submit, for Congress to conclude that the act of voting in a political election

[7] The 1950 Report of a House Subcommittee of the Judiciary Committee proposing to except from the reach of Section 401(e) those Americans who had voted in Italian elections in the 1940's does not lend support to the "penalty" argument (See Pet. Br. 11). While reference was made to the penalty language of the 1935 House Report, the committee also quoted the Cabinet Committee's views (set out in the text, *supra,* pp. 8–9) as to diluted allegiance pointing out that the Cabinet Committee's opinion "coincided" with those of the House Committee on Immigration and Naturalization which recommended the adoption of Section 401(e) (See H. Rep. No. 1469, 81st Cong., 2d Sess., p. 9).

in a foreign state manifests an attachment to another country sufficient to warrant expatriation. We do not argue that, in decreeing loss of citizenship as a consequence of such voting, Congress was "simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of citizenship." *Perez* v. *Brownell,* 356 U.S. 44, 69 (dissenting opinion). Not every act of voting in a foreign election invariably means that the person who votes intends, in fact, to abandon his United States citizenship. But subjective intent is not the standard by which the statute is to be tested. Thus, not every person who formally acquires the nationality of a foreign state by naturalization necessarily and inevitably transfers his subjective allegiance from the country of his birth to the country in which he acquires nationality. Yet it is not seriously doubted that Congress could legitimately declare that one who voluntarily acquires the nationality of another country thereby loses his United States citizenship. The proper test is whether the act (voting) generally has sufficient connotations of political commitment to another country to justify the loss of United States nationality. By this test, Section 401(e) is within the constitutional power of Congress.

Of particular significance here are this Court's decisions in *Savorgnan* v. *United States,* 338 U.S. 491, and *Mackenzie* v. *Hare,* 239 U.S. 299. In the former, this Court upheld loss of nationality, under a statute which provided for denationalization on taking an oath of allegiance to a foreign state, even though the petitioner, a native-born citizen, had taken such an

oath without intent to abandon her United States residence or to divest herself of American citizenship. Similarly, in *Mackenzie* the Court sustained a statute taking away the citizenship of an American woman during her marriage to a foreigner even though she had neither left the United States nor intended to lose her citizenship by such marriage. Both cases stand for the proposition that a subjective intent to retain citizenship does not bar loss of citizenship where the expatriating conduct is not only reasonably related to foreign affairs considerations but significantly conveys the concept of commitment to another nation.

Voting in a foreign election—both as a practical matter and as a matter of symbolic connotation—evinces such a commitment. In a democracy, voting is, for most people, the highest form of involvement in the political processes of the state. In practically every national election—and certainly so under Israel's system of straight-party voting and proportional representation [8]—a vote plays an integral role in determining how the government is to be constituted and what, in broad outline at least, its policies shall be. The performance of this function necessarily carries with it a commitment to the country involved. Surely, a vote cast in a national election in the United States connotes such commitment and allegiance.[9] The fact, noted in the Chief Justice's dissenting opin-

[8] See Krainés, *Government and Politics in Israel*, pp. 84–98 (1961).

[9] While the United Nations document cited by petitioner (Pet. Br. 13–14, n. 11) lists only the United States as expressly providing for expatriation on the basis of voting in a foreign elec-

ion in *Perez, supra,* 356 U.S. at 62, 77, that in certain American States non-citizens were permitted to vote in national elections until 1928 does not militate against this conclusion. In most of the period prior to 1928, this country was actively inviting immigration with the expectation that most of those who came would ultimately become citizens or at least throw in their lot with this country. In these circumstances, voting by aliens was allowed as a method to encourage their commitment to this country and as a sign that they had, in fact, developed such allegiance. It is significant in this connection that as our immigration policies became more restrictive, the right of aliens to vote contracted.

Section 401(e) applies this view to those citizens who exercise such cardinal rights in foreign political elections. It embodies the reasonable assumption that acts such as voting (or taking an oath of allegiance) are not usually done hurriedly or without thought, but only after solemn consideration. Like a solemn oath of allegiance, the ceremony of voting conveys the image of a purposeful act of political commitment to a foreign state. Of course, an American residing abroad must comply with the laws of the country in which he resides and if that law requires that he vote,

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tion, it shows that Luxembourg, Mexico, Venezuela, and New Zealand expatriate for "participating in foreign national rights or duties" and that Australia, Canada, Israel, Nicaragua, Pakistan, Switzerland, Union of South Africa, United Kingdom and Yugoslavia expatriate for "[i]ndicating oneself to be * * * disaffected" (*National Legislation Concerning Grounds for Deprivation of Nationality* (Report of United Nations General Assembly, International Law Commission, 5th Sess., 1953), p. 6).

or he is otherwise required to vote involuntarily, no loss of American citizenship follows therefrom. *Nishikawa* v. *Dulles,* 356 U.S. 129. But that is not this case. Here petitioner voted under no compulsion, but of his own free choice. Indeed, such voting, with its concomitant requirement of residence in Israel (see Warsoff, *Citizenship in the State of Israel,* 33 N.Y.U.L. Rev. 857 (1958)), could well be thought to signify a settled attachment to the foreign country.

It is not critical that, at the time petitioner voted in 1951, he was not an Israeli citizen and that citizenship was not thereby automatically conferred upon him.[10] See Warsoff, *supra,* p. 857. Just as it was not determinative whether Mrs. Savorgnan obtained Italian citizenship by taking an oath of allegiance to Italy, it is not crucial here how Israel treats voting by foreigners in its elections. The critical consideration is how the Congress of the United States could rationally treat that act. Congress could, we submit, reasonably attach to such conduct the same consequence that it has attributed to an oath of allegiance to a foreign state. Statements in *Schneider* v. *Rusk,* 377 U.S. 163, 169, that residence abroad does not indicate dilution of American citizenship because it may be compelled by considerations having nothing to do with political

[10] Israel did not have a nationality law in 1951, and residence, not citizenship, was a qualification for voting. By its 1952 Nationality Law, all Jewish immigrants were made Israeli citizens (retroactive to the date of their immigration or of the founding of the state, whichever was later), unless they executed a written disclaimer of Israeli citizenship. In the elections of 1955 and 1959—in which petitioner apparently also voted (see R. 1-2)—citizenship was a requirement for voting. Kraines, *Government and Politics in Israel,* pp. 85, 165, 168 (1961).

affiliation, does not weaken our argument here. The dispositive difference is that voluntary voting in a political election, unlike residence abroad, presupposes the absence of any compulsion except the solemn personal decision to participate intimately and openly in the political processes of a foreign government. It is, in short, not a necessary element of living abroad; it involves an independent and separate decision to participate in the political affairs of the foreign country. Congress could properly treat that decision as conduct signifying such attachment to the political processes and institutions of another country as to be inconsistent with undiluted allegiance to the United States.[11]

B. CONGRESS COULD REASONABLY CONCLUDE THAT EMBROILMENT OR EMBARRASSMENT IN THE CONDUCT OF FOREIGN AFFAIRS MIGHT STEM FROM AN AMERICAN CITIZEN'S VOTING IN A FOREIGN ELECTION.

The congressional decision that voting in a foreign political election signifies a sufficient commitment to another country to justify loss of United States nationality is strengthened by the fact that, as this Court held in *Perez,* such conduct also carries the potentiality of embarrassment in the conduct of our foreign affairs. This was fully discussed in the *Perez* decision (356 U.S. at 59):

[11] Since petitioner voted in a national Israeli election there is no occasion in this case to decide the validity of judicial and administrative rulings applying Section 401(e) to local elections in foreign countries (See Pet. Br. 14, n. 14). Whatever the case in local elections, voting in a national election reflects an active commitment to a foreign nation *qua* nation, and, accordingly, we submit, constitutes a subordination, if not a complete divestment, of a citizen's attachment to this nation.

> Experience amply attests that, in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country as well as to their fellow citizens. We cannot deny to Congress the reasonable belief that these difficulties might well become acute, to the point of jeopardizing the successful conduct of international relations, when a citizen of one country chooses to participate in the political or governmental affairs of another country. The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government; moreover, the people or government of the foreign country may regard his action to be the action of his government, or at least as a reflection if not an expression of its policy. * * *

The accuracy of these observations is confirmed by the realities of the international scene. A national election in West Germany, South Africa, or India—or, for that matter, anywhere in the world—is certain to have ramifications beyond the geographical limits of the particular country in which the voting takes place. A national election in India would, for example, be viewed with acute concern in Pakistan. Similarly, the Arab states have a paramount interest in the course of political activities in Israel; and, of course, Israel regards the politics of Arab nations with close interest. Numerous other examples could be cited. Suffice it to say that in ways both direct and subtle the tense and volatile relationships among

various countries in the world bear heavily on the day-to-day conduct of this country's foreign policy.

In such circumstances, for Americans to interject themselves in the political processes of foreign nations can compound the difficulty facing this nation in the serious business of fashioning a viable foreign policy. The foreign state in which the voting occurs may charge this country with meddling, and sensitive problems of protection of the American citizen may result. But even if that state does not object to our citizens' voting, there is still the real threat that other countries with an interest in the outcome of that state's elections will consider voting by American citizens offensive. Justifiably or not, the vote of the citizen may be deemed to reflect the official views of the government; the individual American may be considered "as our spokesman or our operative." *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 187 (concurring opinion of Mr. Justice Brennan). The daily newspapers in recent years have reported countless incidents in which Americans visiting or residing in foreign lands have been accused of acting as governmental agents and engaging in conduct—often ostensibly quite innocuous—inimical to the host country. If such conduct can create international friction, it is surely not unreasonable for Congress to conclude that much more serious repercussions might result from our citizens' open participation in foreign elections.

As this Court held in *Perez,* "[t]he subtle influences and repercussions" which the problem poses require that it "be regulable on more than an *ad hoc* basis" (356 U.S. at 59). The Court there reasoned

that congressional action could not be narrowly circumscribed because (*id.* at 60):

> The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem.

There is no reason to depart from these principles. Congress has the "power to legislate generally, unlimited by proof of the existence of the evils in each particular situation" (*North Amer. Co.* v. *Securities & Exchange Commission,* 327 U.S. 686, 711), provided, of course, that the measures adopted are not "inappropriate to the difficulties to be dealt with." *Perez,* 356 U.S. at 60. It was the congressional decision that only by the corrective or loss of citizenship could the problems that foreign voting might create be thoroughly dispelled; automatic termination of citizenship the moment the ballot is cast removes the basis for international disputes before difficulties can arise. The remedy is doubtless effective. One can readily conceive of situations in which recriminations would not be stilled by an official disclaimer of responsibility after the fact or other formal representations that the individual voter does not reflect this

government's official position on particular foreign affairs issues.[9] Under Section 401(e), however, the same act which gives rise to the charge of intermeddling also terminates the citizenship of the alleged "meddler." Congress could reasonably conclude that in no more direct and meaningful way could this country make clear to the world that the vote of its citizen is not to be taken as evidence that this nation was actively interfering in the affairs of a foreign state.

The provision also serves as a warning to Americans residing abroad to refrain from the potentially embarrassing conduct of engaging in foreign electoral processes. It cannot be fairly said that citizens who vote in foreign political elections are without fair notice of the consequences which that act entails (see Pet. Br. 24–25). It is now more than twenty-five years since Section 401(e) was first adopted in the Nationality Act of 1940, and this provision has been continued by Congress in the Immigration and Nationality Act of 1952. During this period of time, American citizens residing abroad have been put on notice that Congress deemed such an act inconsistent with complete allegiance to this country and a source of foreign affairs problems. Surely petitioner, who first voted in Israel some eleven years after Section 401(e) was enacted, had such notice.[12] Having voted nonetheless, he may properly be deemed to have lost his American citizenship.

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[12] Apparently (see R. 1–2), he also voted again in national elections in 1955 and 1959.

C. THERE IS NO FIRST AMENDMENT BAR TO THE EXPATRIATING FORCE OF SECTION 401(e)

Petitioner's claim that the First Amendment precludes the enactment and enforcement of Section 401(e) is unsound. No one has a right under the United States Constitution to vote in a foreign election. Just as no one has the right to take an oath of allegiance to a foreign state or to renounce his American citizenship free from the reasonable consequences which Congress may attach to those acts, Congress may attach consequences to the act of voting in a foreign state. Cf. *Trop* v. *Dulles,* 356 U.S. 86, 104, 106, n. 2 (concurring opinion of Mr. Justice Brennan). As we have shown, Section 401(e) stems from the reasonable congressional determination that the act of voting implies a commitment to the foreign country in which the voting occurs and creates the potential for serious foreign affairs problems. Such a provision—one in effect, requiring that a person decide where his basic political allegiance lies—does not affect his right to speak as he pleases; it simply puts him to the choice of political affiliation. The right to speak does not carry with it the unfettered right to vote in any country one may choose. Cf. *Zemel* v. *Rusk,* 381 U.S. 1, 16–17.

CONCLUSION

It is respectfully submitted that *Perez* v. *Brownell*, 356 U.S. 44, should be followed and the judgment of the court of appeals affirmed.

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JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

FEB 2 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM,

Petitioner,

—v.—

DEAN RUSK, as Secretary of State,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. *No Considered Judicial or Legislative Judgment as to Connection Between Voting and Allegiance.*

Respondent errs insofar as he indicates that this Court in *Perez*[1] (Resp. Br. pp. 3, 7) or the Congress arrived at a considered judgment that a vote by an American citizen in a foreign election manifested a failure in his allegiance to the United States. Regarding the basis for the *Perez* majority opinion, see Justice Brennan's concurrence in *Trop* v. *Dulles*, 356 U. S. 86, at pp. 105-107. As to the legislative history of Section 401(e), it shows a complete lack of legislative attention to principles, precedents, and custom, either national or international, on voting, allegiance, or expatriation.[2] We reiterate that the legislative

[1] *Perez* v. *Brownell*, 356 U. S. 44.

[2] The two conclusory sentences quoted by respondent from a Cabinet Committee report (Resp. Br. pp. 8-9), constitute the entire

failure to analyze and deliberate on the soundness of this unprecedented and drastic provision is attributable to its genesis in a desire to punish a particular suspected group of voters—those in the Saar plebiscite (see Petr. Br. pp. 9-12). The statute thus comes to this Court without the initial claim to reasonableness that arises from a considered Congressional determination.

2. *No Congressional Power to Expatriate on the Basis of "Connotations of Political Commitment."*

Respondent reasons from the Congressional power to denationalize an American citizen when he is naturalized by a foreign state, that Congress can impose a deprivation of citizenship whenever a citizen's act has "sufficient connotations of political commitment" to a foreign government (Resp. Br. p. 11). But certainly there are vast differences between the two powers.

The Congressional authority to denationalize on the basis of naturalization in a foreign state follows from the very purpose underlying the establishment of expatriation in our law. The principle of expatriation was adopted to permit the acquisition of a new citizenship in place of the old; the concept in expatriation was and is of a single, though transferable, basic allegiance (see 356 U. S. at pp. 67-68; Petr. Br. p. 8; *Savorgnan* v. *United States,* 338 U. S. 491, 500). Moreover, obtaining foreign naturalization and taking an oath of foreign allegiance are acts addressed precisely, consciously and deliberately to the existence of citizenship and allegiance. This Government's recognition, like other

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discussion of this provision, except for the following sentence: "If this provision had been in effect when the Saar plebiscite was held, Americans voting in it would have been expatriated."

sovereigns, "that acquisition of foreign nationality ordinarily shows a renunciation of citizenship" (356 U. S. at p. 68), is a far cry from an indefinite and sweeping power to expatriate American citizens on the basis of acts with "connotations of political commitment," as proposed by respondent.[3]

Respondent's statement as to the necessary connotation of allegiance to the United States from a vote cast in an election here (Resp. Br. p. 12), seems strange and short-sighted in view of the clear precedents to the contrary (see Petr. Br. p. 13). The current legal limitations in this country of the franchise in terms of citizenship, cannot be translated into an inherent link between the two and into an inference that the act of voting in a foreign country, whether or not the ballot is restricted to citizens of that country, shows allegiance to it. The error in this transition seems similar to the error in deducing that all men are Socrates because Socrates is a man.

3. *Invalidity of Statute Under Respondent's Proposed Construction.*

Respondent indicates doubt of the constitutionality of section 401(e) as written, suggesting that it may be valid if limited to nationwide elections (Resp. Br. pp. 4, 12, 15). But even if this Court could engage in a re-writing of the

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[3] The statute applied in *Mackenzie* v. *Hare*, 239 U. S. 299 (Resp. Br. p. 11) was explicitly addressed to the status of an American woman when she obtained and while she possessed foreign citizenship.

Petitioner cannot accept respondent's explanation of *Savorgnan* v. *United States*, 338 U. S. 491 (Resp. Br. p. 14), since the Court there stated that the question before it was the effect upon Mrs. Savorgnan's American citizenship of her obtaining Italian citizenship (338 U. S. at pp. 492, 500).

statute—contrary to its established administrative and judicial applications (see Petr. Br. p. 14, n. 14)—the suggested formulation presents additional grounds of invalidity besides those inhering in the terms of the statute. Respondent's position would require a reading of section 401(e) to include an invalid delegation of legislative power; surely Congress could not delegate, without even a specification of standards, the authority to select elections that effect expatriation.[4] Further, the additional uncertainty as to when a vote abroad is expatriative; would aggravate the vice of the statute in failing to provide for notice to the citizen of the grave consequence of his innocuous act of voting abroad (Petr. Br. p. 18). And the statute would nevertheless continue to exert a chilling effect on the right of expression abroad (see Petr. Br. p. 22) with respect to all elections within its apparent ambit.

4. *Conjecture as to Embarrassment in Foreign Relations.*

Though the *Perez* opinion hypothesizes embarrassment in this country's foreign relations from an American citizen's voting abroad, even *Perez* does not support respondent's dangerous suggestion (Br. p. 15) that the "potentiality of embarrassment" strengthens the inference of the citizen's commitment to another government.

Respondent de-emphasizes the *Perez* supposition of embarrassment in our relations with the country where the voting occurs (Br. p. 17)—perhaps because one can equally or better suppose that action by this Government against a citizen on the basis of his lawful act in another country would seem an affront to the latter. Respondent adds a new conjecture—that countries other than the one where

[4] Cf. *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 587-588.

the American casts his vote will view him as acting at the direction of this Government. But certainly the international friction resulting from charges that Americans are engaging in espionage and acting in other secretive ways as Government agents (Resp. Br. p. 17), does not support the supposition that such an agency will be inferred from their open casting of a ballot.

Neither the *Perez* speculation as to embarrassment nor the respondent's speculation find any support whatsoever in the legislative history (see Petr. Br. p. 20), or in any event either before or since the passage of the statute, despite the thousands of citizens who have cast their votes abroad and been expatriated therefor (see Petr. Br. p. 15, n. 15). Almost anything is possible. But a wholly remote and conjectural possibility cannot justify such a drastic measure as expatriation and the restriction of the First Amendment right of expression (see Petr. Br. pp. 19, 23).[5]

Respectfully submitted,

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January 1967

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[5] Even if the casting of a vote is not deemed within the protection of the First Amendment, and even if the First Amendment area were deemed excluded from the *Perez* doctrine, there are manifest dangers in the view that Congress can impose denationalization as a corrective for potential embarrassment from our citizens' conduct abroad. The power could be applied to various types of non-First Amendment activity—for example, any violation by an American of the law of his foreign country of residence.

SUPREME COURT OF THE UNITED STATES

No. 456.—October Term, 1966.

Beys Afroyim, Petitioner, v. Dean Rusk, Secretary of State.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 29, 1967.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner, born in Poland in 1893, emigrated to this country in 1912 and became a naturalized American citizen in 1926. He went to Israel in 1950, and in 1951 he voluntarily voted in an election for the Israeli Knesset, the legislative body of Israel. In 1960, when he applied for renewal of his United States passport, the Department of State refused to grant it on the sole ground that he had lost his American citizenship by virtue of § 401 (e) of the Nationality Act of 1940 which provides that a United States citizen shall "lose" his citizenship if he votes "in a political election in a foreign state." [1] Petitioner then brought this declaratory judgment action in federal district court alleging that § 401 (e) violates both the Due Process Clause of the Fifth Amendment and § 1, cl. 1, of the Fourteeth Amendment [2] which grants American

[1] 54 Stat. 1137, as amended, 58 Stat. 746, 8 U. S. C. § 801:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

. . . . . .

"(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

This provision was re-enacted as § 349 (a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U. S. C. § 1481 (a)(5).

[2] "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States . . . ."

citizenship to persons like petitioner. Because neither the Fourteenth Amendment nor any other provision of the Constitution expressly grants Congress the power to take away that citizenship once it has been acquired, petitioner contended that the only way he could lose his citizenship was by his own voluntary renunciation of it. Since the Government took the position that § 401 (e) empowers it to terminate citizenship without the citizen's voluntary renunciation, petitioner argued that this section is prohibited by the Constitution. The District Court and the Court of Appeals, rejecting this argument, held that Congress has constitutional authority forcibly to take away citizenship for voting in a foreign country based on its implied power to regulate foreign affairs. Consequently, petitioner was held to have lost his American citizenship regardless of his intention not to give it up. This is precisely what this Court held in *Perez* v. *Brownell*, 356 U. S. 44.

Petitioner, relying on the same contentions about voluntary renunciation of citizenship which this Court rejected in upholding § 401 (e) in *Perez*, urges us to reconsider that case, adopt the view of the minority there, and overrule it. That case, decided by a 5–4 vote 10 years ago, has been a source of controversy and confusion ever since, as was emphatically recognized in the opinions of all the judges who participated in this case below.[3] Moreover, in the other cases decided with [4] and since [5] *Perez*, this Court has consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation. It has done so on

[3] 250 F. Supp. 686; 361 F. 2d 102, 105.

[4] *Trop* v. *Dulles*, 356 U. S. 86; *Nishikawa* v. *Dulles*, 356 U. S. 129.

[5] *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144; *Schneider* v. *Rusk*, 377 U. S. 163. In his concurring opinion in *Mendoza-Martinez*, MR. JUSTICE BRENNAN expressed "felt doubts of the correctness of *Perez* . . . ." 372 U. S., at 187.

various grounds and has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship. These cases, as well as many commentators,[6] have cast great doubt upon the soundness of *Perez*. Under these circumstances, we granted certiorari to reconsider it, 385 U. S. 917. In view of the many recent opinions and dissents comprehensively discussing all the issues involved, we deem it unnecessary to treat this subject at great length.

The fundamental issue before this Court here, as it was in *Perez*, is whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. The majority in *Perez* held that Congress could do this because withdrawal of citizenship is "reasonably calculated to effect the end that is within the power of Congress to achieve." 356 U. S., at 60. That conclusion was reached by this chain of reasoning: Congress has an implied power to deal with foreign affairs as an indispensable attribute of sovereignty; this implied power, plus the Necessary and Proper Clause, empowers Congress to regulate voting by American citizens in for-

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[6] See, *e. g.*, Agata, Involuntary Expatriation and Schneider v. Rusk, 27 U. Pitt. L. Rev. 1 (1965); Hurst, Can Congress Take Away Citizenship?, 29 Rocky Mt. L. Rev. 62 (1956); Kurland, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 Harv. L. Rev. 143, 169–175; Comment, 56 Mich. L. Rev. 1142 (1958); Note, Forfeiture of Citizenship Through Congressional Enactment, 21 U. Cin. L. Rev. 59 (1952); 40 Cornell L. Q. 365 (1955); 25 U. So. Cal. L. Rev. 196 (1952). But see, *e. g.*, Comment, The Expatriation Act of 1954, 64 Yale L. J. 1164 (1955).

[7] See *Perez* v. *Brownell*, *supra*, at 62 (dissenting opinion of THE CHIEF JUSTICE), 79 (dissenting opinion of MR. JUSTICE DOUGLAS); *Trop* v. *Dulles*, *supra*, at 91–93 (part I of opinion of Court); *Nishikawa* v. *Dulles*, *supra*, at 138 (concurring opinion of MR. JUSTICE BLACK).

eign elections; involuntary expatriation is within the "ample scope" of "appropriate modes" Congress can adopt to effectuate its general regulatory power. *Id.*, at 57–60. Then, upon summarily concluding that "there is nothing . . . in the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship," *id.*, at 58, n. 3, the majority specifically rejected the "notion that the power of Congress to terminate citizenship depends upon the citizen's assent," *id.*, at 61.

First we reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution, of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power. And even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that under the Constitution the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship. On three occasions, in 1795, 1797, and 1818, Congress considered and rejected proposals to enact laws which would describe cer-

tain conduct as resulting in expatriation.[8] On each occasion Congress was considering bills that were concerned with recognizing the right of voluntary expatriation and with providing some means of exercising that right. In 1795 and 1797, many members of Congress still adhered to the English doctrine of perpetual allegiance and doubted whether a citizen could even voluntarily renounce his citizenship.[9] By 1818, however, almost no one doubted the existence of the right of voluntary expatriation, but several judicial decisions had indicated that the right could not be exercised by the citizen without the consent of the Federal Government in the form of enabling legislation.[10] Therefore, a bill was introduced to provide that a person could voluntarily relinquish his citizenship by declaring such relinquishment in writing before a district court and then departing from the country.[11] The opponents of the bill argued that Congress had no constitutional authority, either express or implied, either under the Naturalization Clause or the Necessary and Proper Clause, to provide that a certain act would constitute expatriation.[12] They pointed to a proposed Thirteenth

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[8] For a history of the early American view of the right of expatriation, including these congressional proposals, see generally Roche, The Early Development of United States Citizenship (1949); Tsiang, Expatriation in America Prior to 1907 (1942); Dutcher, The Right of Expatriation, 11 Am. L. Rev. 447 (1877); Roche, The Loss of American Nationality—The Development of Statutory Expatriation, 99 U. Pa. L. Rev. 25 (1950); Slaymaker, The Right of the American Citizen to Expatriate, 37 Am. L. Rev. 191 (1903).

[9] 4 Annals of Cong. 1005, 1027–1030 (1793–1795); 7 Annals of Cong. 349 *et seq.* (1797–1798).

[10] See, *e. g.*, *Talbot* v. *Jansen*, 3 Dall. 133.

[11] 31 Annals of Cong. 495 (1817–1818).

[12] *Id.*, at 1036–1037, 1058. Although some of the opponents, believing that citizenship was derived from the States, argued that any power to prescribe the mode for its relinquishment rested in the States, they were careful to point out that "the absence of all

Amendment, subsequently not ratified, which would have provided that a person would lose his citizenship by accepting an office or emolument from a foreign government.[13] Congressman Anderson of Kentucky argued:

> "The introduction of this article declares the opinion . . . that Congress could not declare the acts which should amount to a renunciation of citizenship; otherwise there would have been no necessity for this last resort. When it was settled that Congress could not declare that the acceptance of a pension or office from a foreign Emperor amounted to a disfranchisement of the citizen, it must surely be conceded that they could not declare that any other act did. The cases to which their powers before this amendment confessedly did not extend, are very strong, and induce a belief that Congress could not in any case declare the acts which should cause 'a person to cease to be a citizen.' The want of power in a case like this, where the individual has given the strongest evidence of attachment to a foreign potentate and an entire renunciation of the feelings and principles of an American citizen, certainly establishes the absence of all power to pass a bill like the present one. Although the intention with which it was introduced, and the title of the bill declare that it is to insure and foster the right of the citizen, the direct and inevitable effect of the bill, is an assumption of power by Congress to declare that certain acts when committed shall amount to a renunciation of citizenship." 31 Annals of Congress 1038–1039 (1817–1818).

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power from the State Legislatures would not vest it in us." *Id.*, at 1039.

[13] The amendment had been proposed by the 11th Cong., 2d Sess. See The Constitution of the United States of America, S. Doc. No. 39, 88th Cong., 1st Sess., 77–78 (1964).

Congressman Pindall of Virginia rejected the notion, later accepted by the majority in *Perez*, that the nature of sovereignty gives Congress a right to expatriate citizens:

> "[A]llegiance imports an obligation on the citizen or subject, the correlative right to which resides in the sovereign power; allegiance in this country is not due to Congress, but to the people, with whom the sovereign power is found; it is, therefore, by the people only that any alteration can be made of the existing institutions with respect to allegiance." *Id.*, at 1045.

Although he recognized that the bill merely sought to provide a means of voluntary expatriation, Congressman Lowndes of South Carolina argued:

> "But, if the Constitution had intended to give to Congress so delicate a power, it would have been expressly granted. That it was a delicate power and ought not to be loosely inferred, . . . appeared in a strong light, when it was said, and could not be denied, that to determine the manner in which a citizen may relinquish his right of citizenship, is equivalent to determining how he shall be divested of that right. The effect of assuming the exercise of these powers will be, that by acts of Congress a man may not only be released from all the liabilities, but from all the privileges of a citizen. If you pass this bill, . . . you have only one step further to go, and say that such and such acts shall be considered as presumption of the intention of the citizen to expatriate, and thus take from him the privileges of a citizen. . . . [Q]uestions affecting the right of the citizen were questions to be regulated, not by the laws of the General or State Governments, but by Constitutional provisions. If there was anything

> essential to our notion of a Constitution, . . . it was this: that while the employment of the physical force of the country is in the hands of the Legislature, those rules which determine what constitutes the rights of the citizen, shall be a matter of Constitutional provision." *Id.*, at 1050–1051.

The bill was finally defeated.[14] It is in this setting that six years later, in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 827, this Court, speaking through Chief Justice Marshall, declared in what appears to be a mature and well-considered dictum that Congress, once a person becomes a citizen, cannot deprive him of that status:

> "[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."

Although these legislative and judicial statements may be regarded as inconclusive and must be considered in the historical context in which they were made,[15] any doubt

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[14] *Id.*, at 1071. It is interesting to note that the proponents of the bill, such as Congressman Cobb of Georgia, considered it to be "the simple declaration of the manner in which a voluntary act, in the exercise of a natural right, may be performed" and denied that it created or could lead to the creation of "a presumption of relinquishment of the right of citizenship." *Id.*, at 1068.

[15] The dissenting opinion here points to the fact that a Civil War Congress passed two Acts designed to deprive military deserters to the Southern side of the rights of citizenship. Measures of this kind passed in those days of emotional stress and hostility are by no means the most reliable criteria for determining what the Constitution means.

as to whether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship once obtained should have been removed by the unequivocal terms of the Amendment itself. It provides its own constitutional rule in language calculated completely to control the status of citizenship: "All persons born or naturalized in the United States . . . are citizens of the United States . . ." There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.

It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. The *Dred Scott* decision, 19 How. 393, had shortly before greatly disturbed many people about the status of Negro citizenship. But the Civil Rights Act of 1866, 14 Stat. 27, had already attempted to confer citizenship on all persons born or naturalized in the United States. Nevertheless, when the Fourteenth Amendment passed the House without containing any definition of citizenship, the sponsors of the Amendment in the Senate insisted on inserting a constitutional definition and grant of citizenship. They expressed fears that the citizenship so recently conferred on Negroes by the Civil Rights Act could be just as easily taken away from them by subsequent Congresses, and it was to provide an insuperable obstacle against every governmental effort to strip Negroes of their newly acquired citizenship that the first clause was added to the Fourteenth Amend-

ment.[16] Senator Howard, who sponsored the Amendment in the Senate, thus explained the purpose of the clause:

> "It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. . . . We desired to put this question of citizenship and the rights of citizens . . . under the civil rights bill beyond the legislative power . . . ." Cong. Globe, 39th Cong., 1st Sess., 2890, 2896 (1866).

This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted. Though the framers of the Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy. In 1868, two years after the Fourteenth Amendment had been adopted, Congress specifically considered the subject of expatriation. Several bills were introduced to impose involuntary expatriation on citizens who committed certain acts.[17] With little

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[16] Cong. Globe, 39th Cong., 1st Sess., 2768–2769, 2869, 2890 *et seq.* (1866). See generally, Flack, Adoption of the Fourteenth Amendment 88–94 (1908).

[17] Representative Jenckes of Rhode Island introduced an amendment that would expatriate those citizens who became naturalized by a foreign government, performed public duties for a foreign government, or took up domicile in a foreign country without intent to return. Cong. Globe, 40th Cong., 2d Sess., 968, 1129, 2311 (1868). Although he characterized his proposal as covering "cases where citizens may voluntarily renounce their allegiance to this country," *id.*,

discussion, these proposals were defeated. Other bills, like the one proposed but defeated in 1818, provided merely a means by which the citizen could himself voluntarily renounce his citizenship.[18] Representative Van Trump of Ohio, who proposed such a bill, vehemently denied in supporting it that his measure would make the Government "a party to the act dissolving the tie between the citizen and his country . . . where the statute simply prescribes the manner in which the citizen shall proceed to perpetuate the evidence of his intention, or election, to renounce his citizenship by expatriation." Cong. Globe, 40th Cong., 2d Sess., 1804 (1868). He insisted that "inasmuch as the act of expatriation depends almost entirely upon a question of intention on the part of the citizen," *id.*, at 1801, "the true question is, that not only the right of expatriation, but the whole power of its exercise, rests solely and exclusively in the will of the individual," *id.*, at 1804.[19] In strongest of terms, not contradicted by any during the debates, he concluded:

> "To enforce expatriation or exile against a citizen without his consent is not a power anywhere belong-

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at 1159, it was opposed by Representative Chanler of New York who said, "So long as a citizen does not expressly dissolve his allegiance and does not swear allegiance to another country, his citizenship remains in *statu quo*, unaltered and unimpaired." *Id.*, at 1016.

[18] Proposals of Representatives Pruyn of New York (*id.*, at 1130) and Van Trump of Ohio (*id.*, at 1801, 2311).

[19] While Van Trump disagreed with the 1818 opponents as to whether Congress had power to prescribe a means of voluntary renunciation of citizenship, he wholeheartedly agreed with their premise that the right of expatriation belongs to the citizen, not to the Government, and that the Constitution forbids the Government from being party to the act of expatriation. Van Trump simply thought that the opponents of the 1818 proposal failed to recognize that their mutual premise would not be violated by an

ing to this Government. No conservative-minded statesman, no intelligent legislator, no sound lawyer has ever maintained any such power in any branch of the Government. The lawless precedents created in the delirium of war, . . . of sending men by force into exile, as a punishment for political opinion, were violations of this great law . . . of the Constitution. . . . The men who debated the question in 1818 failed to see the true distinction. . . . They failed to comprehend that it is not the Government, but that it is the individual, who has the right and the only power of expatriation. . . . [I]t belongs and appertains to the citizen and not to the Government; and it is the evidence of his election to exercise his right, and not the power to control either the election or the right itself, which is the legitimate subject matter of legislation. There has been, and there can be, no legislation under our Constitution to control in any manner the right itself." *Ibid.*

But even Van Trump's proposal, which went no further than to provide a means of evidencing a citizen's intent to renounce his citizenship, was defeated.[20] The Act,

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Act which merely prescribed "how . . . [the rights of citizenship] might be relinquished at the option of the person in whom they were vested." Cong. Globe, 40th Cong., 2d Sess., 1804 (1868).

[20] *Id.*, at 2317. Representative Banks of Massachusetts, the Chairman of the House Committee on Foreign Affairs which drafted the bill eventually enacted into law, explained why Congress refrained from providing a means of expatriation:

"It is a subject which, in our opinion, ought not to be legislated upon. . . . [T]his comes within the scope of natural rights which no Government has the right to control and which no Government can confer. And wherever this subject is alluded to in the Constitution— . . . it is in the declaration that Congress shall have no power whatever to legislate upon these matters." *Id.*, at 2316.

as finally passed, merely recognized the "right of expatriation" as an inherent right of all people.[21]

The entire legislative history of the 1868 Act makes it abundantly clear that there was a strong feeling in the Congress that the only way the citizenship it conferred could be lost was by the voluntary renunciation or abandonment by the citizen himself. And this was the unequivocal statement of the Court in the case of *United States* v. *Wong Kim Ark*, 169 U. S. 649. The issues in that case were whether a person born in the United States to Chinese aliens was a citizen of the United States and whether, nevertheless, he could be excluded under the Chinese Exclusion Act. The Court first held that within the terms of the Fourteenth Amendment, Wong Kim Ark was a citizen of the United States, and then pointed out that though he might "renounce this citizenship, and become a citizen of . . . any other country," he had never done so. *Id.*, at 704–705. The Court then held[22] that Congress could not do anything to abridge or affect his citizenship conferred by the Fourteenth Amendment. Quoting Chief Justice Marshall's well-considered and oft-repeated dictum in *Osborn* to the effect that Congress under the power of naturalization has "a power to confer citizenship, not a power to take it away," the Court said:

> "Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act . . . of Congress . . .

[21] 15 Stat. 223, R. S. § 1999.

[22] Some have referred to this part of the decision as a holding, see, *e. g.*, Hurst, *supra*, 29 Rocky Mt. L. Rev., at 78–79; Comment, 56 Mich. L. Rev., at 1153–1154; while others have referred to it as *obiter dictum*, see, *e. g.*, Roche, *supra*, 99 U. Pa. L. Rev., at 26–27. Whichever it was, the statement was evidently the result of serious consideration and is entitled to great weight.

> can affect citizenship acquired as a birthright, by virtue of the Constitution itself . . . . The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." *Id.*, at 703.

To uphold Congress' power to take away a man's citizenship because he voted in a foreign election in violation of § 401 (e) would be equivalent to holding that Congress has the power to "abridge," "affect," "restrict the effect of," and "take . . . away" citizenship. Because the Fourteenth Amendment prevents Congress from doing any of these things, we agree with the Chief Justice's dissent in the *Perez* case that the Government is without power to rob a citizen of his citizenship under § 401 (e).[23]

Because the legislative history of the Fourteenth Amendment and the expatriation proposals which preceded and followed it, like most other legislative history, contains many statements from which conflicting inferences can be drawn, our holding might be unwarranted if it rested entirely or principally upon that legislative history. But it does not. Our holding we think is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee. Citizenship is no light trifle

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[23] Of course, as THE CHIEF JUSTICE said in his dissent, 356 U. S., at 66, naturalization unlawfully procurred can be set aside. See, *e. g.*, *Knauer* v. *United States*, 328 U. S. 654; *Baumgartner* v. *United States*, 322 U. S. 665; *Schneiderman* v. *United States*, 320 U. S. 118.

to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

Perez v. *Brownell* is overruled. The judgment is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 456.—October Term, 1966.

Beys Afroyim, Petitioner, v. Dean Rusk, Secretary of State.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 29, 1967.]

Mr. Justice Harlan, whom Mr. Justice Clark, Mr. Justice Stewart, and Mr. Justice White join, dissenting.

Ten years ago, in *Perez* v. *Brownell*, 356 U. S. 44, the Court upheld the constitutionality of § 401 (e) of the Nationality Act of 1940. 54 Stat. 1169. The section deprives of his nationality any citizen who has voted in a foreign political election. The Court reasoned that Congress derived from its power to regulate foreign affairs authority to expatriate any citizen who intentionally commits acts which may be prejudicial to the foreign relations of the United States, and which reasonably may be deemed to indicate a dilution of his allegiance to this country. Congress, it was held, could appropriately consider purposeful voting in a foreign political election to be such an act.

The Court today overrules *Perez*, and declares § 401 (e) unconstitutional, by a remarkable process of circumlocution. First, the Court fails almost entirely to dispute the reasoning in *Perez;* it is essentially content with the conclusory and quite unsubstantiated assertion that Congress is without "any general power, express or implied," to expatriate a citizen "without his assent." [1] Next, the

[1] It is appropriate to note at the outset what appears to be a fundamental ambiguity in the opinion for the Court. The Court at one point intimates, but does not expressly declare, that it adopts the reasoning of the dissent of The Chief Justice in *Perez*. The Chief Justice there acknowledged that "actions in derogation of

Court embarks upon a lengthy, albeit incomplete, survey of the historical background to the congressional power at stake here, and yet, at the end, concedes that the history is susceptible to "conflicting inferences." The Court acknowledges that its conclusions might not be warranted by that history alone, and disclaims that the decision today relies, even "principally," upon it. Finally, the Court declares that its result is bottomed upon the "language and purpose" of the Citizenship Clause of the Fourteenth Amendment; in explanation, the Court offers only the terms of the clause itself, the contention that any other result would be "completely incongruous," and the essentially arcane observation that the "citizenry is the country and the country is its citizenry."

I can find nothing in this extraordinary series of circumventions which permits, still less compels, the imposition of this constitutional contraint upon the authority of Congress. I must respectfully dissent.

There is no need here to rehearse Mr. Justice Frankfurter's opinion for the Court in *Perez;* it then proved and still proves to my satisfaction that § 401 (e) is

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undivided allegiance to this country" had "long been recognized" to result in expatriation, *id.*, at 68; he argued, however, that the connection between voting in a foreign political election and abandonment of citizenship was logically insufficient to support a presumption that a citizen had renounced his nationality. *Id.*, at 76. It is difficult to find any semblance of this reasoning, beyond the momentary reference to the opinion of THE CHIEF JUSTICE, in the approach taken by the Court today; it seems instead to adopt a substantially wider view of the restrictions upon Congress' authority in this area. Whatever the Court's position, it has assumed that voluntariness is here a term of fixed meaning; in fact, of course, it has been employed to describe both a specific intent to renounce citizenship, and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship. Until the Court indicates with greater precision what it means by "assent," today's opinion will surely cause still greater confusion in this area of the law.

within the power of Congress.[2] It suffices simply to supplement *Perez* with an examination of the historical evidence which the Court in part recites, and which provides the only apparent basis for many of the Court's conclusions. As will be seen, the available historical evidence is not only inadequate to support the Court's abandonment of *Perez*, but, with due regard to the restraints that should surround the judicial invalidation of an Act of Congress, even seems to confirm *Perez*' soundness.

I.

Not much evidence is available from the period prior to the adoption of the Fourteenth Amendment through which the then prevailing attitudes on these constitutional questions can now be determined. The questions pertinent here were only tangentially debated; controversy centered instead upon the wider issues of whether a citizen might under any circumstances *renounce* his citizenship, and, if he might, whether that right should

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[2] It is useful, however, to reiterate the essential facts of this case, for the Court's very summary statement might unfortunately cause confusion about the situation to which § 401 (e) was here applied. Petitioner emigrated to Israel in 1950, and, although the issue was not argued at any stage of these proceedings, it was assumed by the District Court that he "has acquired Israeli citizenship." 250 F. Supp. 686, 687. He voted in the election for the Israeli Knesset in 1951, and, as his Israeli Identification Booklet indicates, in various political elections which followed. Transcript of Record 1–2. In 1960, after 10 years in Israel, petitioner determined to return to the United States, and applied to the United States Consulate in Haifa for a passport. The application was rejected, and a Certificate of Loss of Nationality, based entirely on his participation in the 1951 election, was issued. Petitioner's action for declaratory judgment followed. There is, as the District Court noted, "no claim by the [petitioner] that the deprivation of his American citizenship will render him a stateless person." *Ibid.*

be conditioned by any formal prerequisites.[3] Even the discussion of these issues was seriously clouded by the widely accepted view that authority to regulate the incidents of citizenship had been retained, at least in part, by the several States.[4] It should therefore be remembered that the evidence which is now available may not necessarily represent any carefully considered, still less prevailing, viewpoint upon the present issues.

Measured even within these limitations, the Court's evidence for this period is remarkably inconclusive; the Court relies simply upon the rejection by Congress of legislation proposed in 1794, 1797, and 1818, and upon an isolated dictum from the opinion of Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738. This, as will appear, is entirely inadequate to support the Court's conclusion, particularly in light of other and more pertinent evidence which the Court does not notice.

The expatriation of unwilling citizens was apparently first discussed in the lengthly congressional debates of 1794 and 1795, which culminated eventually in the Uniform Naturalization Act of 1795.[5] 1 Stat. 414. Little contained in those debates is pertinent here. The present

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[3] See generally Tsiang, The Question of Expatriation in America Prior to 1907, 25–70; Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 327–330; Roche, Loss of American Nationality, 4 West. P. Q. 268.

[4] Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 329. Although the evidence, which consists principally of a letter to Albert Gallatin, is rather ambiguous, Jefferson apparently believed even that a state expatriation statute could deprive a citizen of his federal citizenship. 1 Writings of Albert Gallatin (Adams ed. 1879) 301–302. His premise was presumably that state citizenship was primary, and that federal citizenship attached only through it. See Tsiang, *supra*, at 25. Gallatin's own views have been described as essentially "states' rights"; see Roche, Loss of American Nationality, 4 West. P. Q. 268, 271.

[5] See 4 Annals of Cong. 1004 *et seq.*

question was considered only in connection with an amendment, offered by Congressman Hillhouse of Connecticut, which provided that any American who acquired a foreign citizenship should not subsequently be permitted to repatriate in the United States. Although this obscure proposal scarcely seems relevant to the present issues, it was apparently understood at least by some members to require the automatic expatriation of an American who acquired a second citizenship. Its discussion in the House consumed substantially less than one day, and of this debate only the views of two Congressmen, other than Hillhouse, were recorded by the Annals.[6] Murray of Maryland, for reasons immaterial here, supported the proposal. In response, Baldwin of Georgia urged that foreign citizenship was often conferred only as a mark of esteem, and that it would be unfair to deprive of his domestic citizenship an American honored in this fashion. There is no indication that any member believed the proposal to be forbidden by the Constitution. The measure was rejected by the House without a reported vote, and no analogous proposal was offered in the Senate. Insofar as this brief exchange is pertinent here, it establishes at most that two or more members believed the proposal both constitutional and desirable, and that some larger number determined, for reasons that are utterly obscure, that it should not be adopted.

The Court next relies upon the rejection of proposed legislation in 1797. The bill there at issue would have forbidden the entry of American citizens into the service of any foreign state in time of war; its sixth section included machinery by which a citizen might voluntarily expatriate himself.[7] The bill contained nothing which would have expatriated unwilling citizens, and the de-

[6] The discussion and rejection of the amendment are cursorily reported at 4 Annals of Cong. 1028–1030.

[7] The sixth section is set out at 7 Annals of Cong. 349.

bates do not include any pronouncements relevant to that issue. It is difficult to see how the failure of that bill might be probative here.

The debates in 1817 and 1818, upon which the Court so heavily relies, are scarcely more revealing. Debate centered upon a brief bill [8] which provided merely that any citizen who wished to renounce his citizenship must first declare his intention in open court, and thereafter depart the United States. His citizenship would have terminated at the moment of his renunciation. The bill was debated only in the House; no proposal permitting the involuntary expatriation of any citizen was made or considered there or in the Senate. Nonetheless, the Court selects portions of statements made by three individual Congressmen, who apparently denied that Congress had authority to enact legislation to deprive unwilling citizens of their citizenship. These brief dicta are, by the most generous standard, inadequate to warrant the Court's broad constitutional conclusion. Moreover, it must be observed that they were in great part deductions from constitutional premises which have subsequently been entirely abandoned. They stemmed principally from the Jeffersonian contention that allegiance is owed by a citizen first to his State, and only through the State to the Federal Government. The spokesmen upon whom the Court now relies supposed that Congress was without authority to dissolve citizenship, since "we have no control" over "allegiance to the State . . . ." [9] The bill's opponents urged that "The relation to the State government was the basis of the relation to the General Government, and therefore, as long as a man continues a citizen of a State, he must be considered a citizen of the United States." [10] Any statute, it was thought, which

[8] The bill is summarized at 31 Annals of Cong. 495.

[9] 31 Annals of Cong. 1046.

[10] 31 Annals of Cong. 1057.

dissolved federal citizenship while a man remained a citizen of a State "would be inoperative." [11] Surely the Court does not revive this entirely discredited doctrine; and yet so long as it does not, it is difficult to see that any significant support for the ruling made today may be derived from the statements on which the Court relies. To sever the statements from their constitutional premises, as the Court has apparently done, is to transform the meaning these expressions were intended to convey.

Finally, it must be remembered that these were merely the views of three Congressmen; nothing in the debates indicates that their constitutional doubts were shared by any substantial number of the other 67 members who eventually opposed the bill. They were plainly not accepted by the 58 members who voted in the bill's favor. The bill's opponents repeatedly urged that, whatever its constitutional validity, the bill was imprudent and undesirable. Pindall of Virginia, for example, asserted that a citizen who employed its provisions would have "motives of idleness or criminality," [12] and that the bill would thus cause "much evil." [13] McLane of Delaware feared that citizens would use the bill to escape service in the armed forces in time of war; he warned that the bill would, moreover, weaken "the love of country, so necessary to individual happiness and national prosperity." [14] He even urged that "The commission of treason, and the objects of plunder and spoil, are equally legalized by this bill." [15] Lowndes of South Carolina cautioned the House that difficulties might again arise with foreign governments over the rights of seamen if

[11] *Ibid.* Roche describes the Congressmen upon whom the Court chiefly relies as "the states' rights opposition." Loss of American Nationality, 4 West. P. Q. 268, 276.

[12] 31 Annals of Cong. 1047.

[13] 31 Annals of Cong. 1050.

[14] 31 Annals of Cong. 1059.

[15] *Ibid.*

the bill were passed.[16] Given these vigorous and repeated arguments, it is quite impossible to assume, as the Court apparently has, that any substantial portion of the House was motivated wholly, or even in part, by any particular set of constitutional assumptions. These three statements must instead be taken as representative only of the beliefs of three members, premised chiefly upon constitutional doctrines which have subsequently been rejected, and expressed in a debate in which the present issues were not directly involved.

The last piece of evidence upon which the Court relies for this period is a brief *obiter dictum* from the lengthy opinion for the Court in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 827, written by Mr. Chief Justice Marshall. This use of the dictum is entirely unpersuasive, for its terms and context make quite plain that it cannot have been intended to reach the questions presented here. The central issue before the Court in *Osborn* was the the right of the bank to bring its suit for equitable relief in the courts of the United States. In argument, counsel for Osborn had asserted that although the bank had been created by the laws of the United States, it did not necessarily follow that any cause involving the bank had arisen under those laws. Counsel urged by analogy that the naturalization of an alien might as readily be said to confer upon the new citizen a right to bring all his actions in the federal courts. *Id.*, at 813–814. Not surprisingly, the Court rejected the analogy, and remarked that an act of naturalization "does not proceed to give, to regulate, or to prescribe his capacities," since the Constitution demands that naturalized citizens must in all respects stand "on the footing of a native." *Id.*, at 827. The Court plainly meant no more than that counsel's analogy is broken by Congress' inability to offer naturalized citizens rights or capacities

[16] 31 Annals of Cong. 1051.

which differ in any particular from those given to a native-born citizen by birth. Mr. Justice Johnson's discussion of the analogy in dissent confirms the Court's purpose. *Id.*, at 875–876.

Any wider meaning, so as to reach the questions here, wrenches the dictum from its context, and attributes to the Court an observation extraneous even to the analogy before it. Moreover, the construction given to the dictum by the Court today requires the assumption that the Court in *Osborn* meant to decide an issue which had to that moment scarcely been debated, to which counsel in *Osborn* had never referred, and upon which no case had ever reached the Court. All this, it must be recalled, is in an area of the law in which the Court had steadfastly avoided unnecessary comment. See, *e. g.*, *M'Ilvaine* v. *Coxe's Lessee*, 4 Cranch 209, 212–213; *The Santissima Trinidad*, 7 Wheat. 283, 347–348. By any standard, the dictum cannot provide material assistance to the Court's position in the present case.[17]

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[17] Similarly, the Court can obtain little support from its invocation of the dictum from the opinion for the Court in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703. The central issue there was whether a child born of Chinese nationals domiciled in the United States is an American citizen if its birth occurs in this country. The dictum upon which the Court relies, which consists essentially of a reiteration of the dictum from *Osborn*, can therefore scarcely be considered a reasoned consideration of the issues now before the Court. Moreover, the dictum could conceivably be read to hold only that no power to expatriate an unwilling citizen was conferred either by the Naturalization Clause or by the Fourteenth Amendment; if the dictum means no more, it would of course not even reach the holding in *Perez*. Finally, the dictum must be read in light of the subsequent opinion for the Court, written by Mr. Justice McKenna, in *Mackenzie* v. *Hare*, 239 U. S. 299. Despite counsel's invocation of *Wong Kim Ark*, *id.*, at 302 and 303, the Court held in *Mackenzie* that marriage between an American citizen and an alien, unaccompanied by any intention of the citizen to renounce her citizenship, nonetheless permitted Congress to withdraw her nationality. It is immaterial for these purposes that Mrs. Mackenzie's citizenship might,

Before turning to the evidence from this period which has been overlooked by the Court, attention must be given an incident to which the Court refers, but upon which it apparently places relatively little reliance. In 1810, a proposed thirteenth amendment to the Constitution was introduced into the Senate by Senator Reed of Maryland; the amendment, as subsequently modified, provided that any citizen who accepted a title of nobility, pension, or emolument from a foreign state, or who married a person of royal blood, should "cease to be a citizen of the United States." [18] The proposed amendment was, in a modified form, accepted by both Houses, and subsequently obtained the approval of all but one of the requisite number of States.[19] I have found nothing which indicates with any certainty why such a provision should then have been thought necessary, [20] but two reasons suggest themselves for the use of a constitutional amend-

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under the statute there, have been restored upon termination of the marital relatnship; she did not consent to the loss, even temporarily, of her citizenship, and, under the proposition apparently urged by the Court today, it can therefore scarcely matter that her expatriation was subject to some condition subsequent. It seems that neither Mr. Justice McKenna, who became a member of the Court after the argument but before the decision of *Wong Kim Ark*, *supra*, at 732, nor Mr. Chief Justice White, who joined the Court's opinions in both *Wong Kim Ark* and *Mackenzie*, thought that *Wong Kim Ark* requires the result reached by the Court today. Nor, it must be supposed, did the other six members of the Court who joined *Mackenzie*, despite *Wong Kim Ark*.

[18] The various revisions of the proposed amendment may be traced through 20 Annals of Cong. 530, 549, 571–572, 635, 671.

[19] Ames, The Proposed Amendments to the Constitution of the United States during the First Century of Its History, 2 Ann. Rep. Am. Hist. Assn. (1896) 188.

[20] Ames, *supra*, at 187, speculates that the presence of Jerome Napoleon in this country some few years earlier might have caused apprehension, and concludes that the amendment was merely an expression of "animosity against foreigners." *Id.*, at 188.

ment. First, the provisions may have been intended in part as a sanction for Art. I, § 9, cl. 8;[21] it may therefore have been thought more appropriate that it be placed within the Constitution itself. Second, a student of expatriation issues in this period has dismissed the preference for an amendment with the explanation that "the dominant Jeffersonian view held that citizenship was within the jurisdiction of the states; a statute would thus have been a federal usurpation of state power." [22] This second explanation is fully substantiated by the debate in 1818; the statements from that debate set out in the opinion for the Court were, as I have noted, bottomed on the reasoning that since allegiance given by an individual to a State could not be dissolved by Congress, a federal statute could not regulate expatriation. It surely follows that this "obscure enterprise" [23] in 1810, motivated by now discredited constitutional premises, cannot offer any significant guidance for solution of the important issues now before us.

The most pertinent evidence from this period upon these questions has been entirely overlooked by the Court. Twice in the two years immediately prior to its passage of the Fourteenth Amendment, Congress exercised the very authority which the Court now suggests that it should have recognized was entirely lacking. In each case, a bill was debated and adopted by both Houses which included provisions to expatriate unwilling citizens.

In the spring and summer of 1864, both Houses debated intensively the Wade-Davis bill to provide recon-

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[21] The clause provides that "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

[22] Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 335.

[23] *Ibid.*

struction governments for the States which had seceded to form the Confederacy. Among the bill's provisions was § 14, by which "every person who shall hereafter hold or exercise any office . . . in the rebel service . . . is hereby declared not to be a citizen of the United States." [24] Much of the debate upon the bill did not, of course, center on the expatriation provision, although it certainly did not escape critical attention.[25] Nonetheless, I have not found any indication in the debates in either House that it was supposed that Congress was without authority to deprive an unwilling citizen of his citizenship. The bill was not signed by President Lincoln before the adjournment of Congress, and thus failed to become law, but a subsequent statement issued by Lincoln makes quite plain that he was not troubled by any doubts of the constitutionality of § 14.[26] Passage of the Wade-Davis bill of itself "suffices to destroy the notion that the men who drafted the Fourteenth Amendment felt that citizenship was an 'absolute.'" [27]

Twelve months later, and less than a year before its passage of the Fourteenth Amendment, Congress adopted a second measure which included provisions that permitted the expatriation of unwilling citizens. Section 21 of the Enrollment Act of 1865 provided that deserters from the military service of the United States "shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to

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[24] 6 Richardson, Messages and Papers of the Presidents 226.

[25] See, *e. g.*, the comments of Senator Brown of Missouri; Cong. Globe, 38th Cong., 1st Sess., 3460.

[26] Lincoln indicated that although he was "unprepared" to be "inflexibly committed" to "any single plan of restoration," he was "fully satisfied" with the bill's provisions. 6 Richardson, Messages and Papers of the Presidents 222–223.

[27] Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 343.

become citizens; . . . ." [28] The same section extended these disabilities to persons who departed the United States with intent to avoid "draft into the military or naval service . . . ." [29] The bitterness of war did not cause Congress here to neglect the requirements of the Constitution; for it was urged in both Houses that § 21 as written was *ex post facto*, and thus was constitutionally impermissible.[30] Significantly, however, it was never suggested in either debate that expatriation without a citizen's consent lay beyond Congress' authority. Members of both Houses had apparently examined intensively the section's constitutional validity, and yet had been undisturbed by the matters upon which the Court now relies.

Some doubt, based on the phrase "rights of citizenship," has since been expressed [31] that § 21 was intended to require any more than disfranchisement, but this is, for several reasons, unconvincing. First, § 21 also explicitly provided that persons subject to its provisions should not thereafter exercise various "rights of citizens"; [32] if the section had not been intended to cause expatriation, it is difficult to see why these additional provisions would have been thought necessary. Second, the executive authorities of the United States afterwards con-

[28] 13 Stat. 490. It was this provision that, after various recodifications, was held unconstitutional by this Court in *Trop* v. *Dulles*, 356 U. S. 86. A majority of the Court did not there hold that the provision was invalid because Congress lacked all power to expatriate an unwilling citizen. In any event, a judgment by this Court 90 years after the Act's passage can scarcely reduce the Act's evidentiary value for determining whether Congress understood in 1865, as the Court now intimates that it did, that it lacked such power.

[29] 13 Stat. 491.

[30] Cong. Globe, 38th Cong., 2d Sess., 642–643, 1155–1156.

[31] Roche, The Expatriation Cases, 1963 Sup. Ct. Rev. 325, 336.

[32] 13 Stat. 490.

sistently construed the section as causing expatriation.[33] Third, the section was apparently understood by various courts to result in expatriation; in particular, Mr. Justice Strong, while a member of the Supreme Court of Pennsylvania, construed the section to cause a "forfeiture of citizenship," *Huber* v. *Reilly*, 53 Pa. St. 112, 118, and although this point was not expressly reached, his general understanding of the statute was approved by this Court in *Kurtz* v. *Moffitt*, 115 U. S. 487, 501. Finally, Congress in 1867 approved an exemption from the section's provisions for those who had deserted after the termination of general hostilities, and the statute as adopted specifically described the disability from which exemption was given as a "loss of his citizenship." 15 Stat. 14. The same choice of phrase occurs in the pertinent debates.[34]

It thus appears that Congress had twice, immediately before its passage of the Fourteenth Amendment, unequivocally affirmed its belief that it had authority to expatriate an unwilling citizen.

The pertinent evidence for the period prior to the adoption of the Fourteenth Amendment can therefore be summarized as follows. The Court's conclusion today is supported only by the statements, associated at least in part with a now abandoned view of citizenship, of three individual Congressmen, and by the ambiguous and inapposite dictum from *Osborn*. Inconsistent with the Court's position are statements from individual Congressmen in 1794, and Congress' passage in 1864 and 1865 of legislation which expressly authorized the expatriation of unwilling citizens. It may be that legislation adopted in the heat of war should be discounted in part

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[33] 2 Hearings before House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess., 38.

[34] See, *e. g.*, the remarks of Senator Hendricks; Cong. Globe, 40th Cong., 1st Sess., 661.

by its origins, but, even if this is done, it is surely plain that the Court's conclusion is entirely unwarranted by the available historical evidence for the period prior to the passage of the Fourteenth Amendment. The evidence suggests, to the contrary, that Congress in 1865 understood that it had authority, at least in some circumstances, to deprive a citizen of his nationality.

II.

The evidence with which the Court supports its thesis that the Citizenship Clause of the Fourteenth Amendment was intended to lay at rest any doubts of Congress' inability to expatriate without the citizen's consent is no more persuasive. The evidence consists almost exclusively of two brief and general quotations from Howard of Michigan, the sponsor of the Citizenship Clause in the Senate, and of a statement made in a debate in the House of Representatives in 1868 by Van Trump of Ohio. Measured most generously, this evidence would be inadequate to support the important constitutional conclusion presumably drawn in large part from it by the Court; but, as will be shown, other relevant evidence indicates that the Court plainly has mistaken the purposes of the clause's draftsmen.

The Amendment as initially approved by the House contained nothing which described or defined citizenship.[35] The issue did not as such even arise in the House debates; it was apparently assumed that Negroes were citizens, and that it was necessary only to guarantee to them the rights which sprang from citizenship. It is quite impossible to derive from these debates any indication that the House wished to deny itself the authority it had exercised in 1864 and 1865; so far as the House

[35] The pertinent events are described in Flack, Adoption of the Fourteenth Amendment 83–94.

is concerned, it seems that no issues of citizenship were "at all involved." [36]

In the Senate, however, it was evidently feared that unless citizenship were defined, or some more general classification substituted, freedmen might, on the premise that they were not citizens, be excluded from the Amendment's protection. Senator Stewart thus offered an amendment which would have inserted into § 1 a definition of citizenship,[37] and Senator Wade urged as an alternative the elimination of the term "citizen" from the Amendment's first section.[38] After a caucas of the chief supporters of the Amendment, Senator Howard announced on their behalf that they favored the addition of the present Citizenship Clause.[39]

The debate upon the clause was essentially cursory in both Houses, but there are several clear indications of its intended effect. Its sponsors evidently shared the fears of Senators Stewart and Wade that unless citizenship were defined, freedmen might, under the reasoning of the *Dred Scott* decision,[40] be excluded by the courts from the scope of the Amendment. It was agreed that, since the "courts have stumbled on the subject," it would be prudent to remove the "doubt thrown over" it.[41] The clause would essentially overrule *Dred Scott*, and place beyond question the freedmen's right of citizenship because of birth. It was suggested, moreover, that it would, by creating a basis for federal citi-

[36] *Id.*, at 84.

[37] Cong. Globe, 39th Cong., 1st Sess., 2560.

[38] Wade would have employed the formula "persons born in the United States or naturalized by the laws thereof" to measure the section's protection. Cong. Globe, 39th Cong., 1st Sess., 2768–2769.

[39] Cong. Globe, 39th Cong., 1st Sess., 2869. The precise terms of the discussion in the caucus were, and have remained, unknown. For contemporary comment, see Cong. Globe, 39th Cong., 1st Sess., 2939.

[40] *Scott* v. *Sandford*, 19 How. 393.

[41] Cong. Globe, 39th Cong., 1st Sess., 2768.

zenship which was indisputably independent of state citizenship, preclude any effort by state legislatures to circumvent the Amendment by denying freedmen state citizenship.[42] Nothing in the debates, however, supports the Court's assertion that the clause was intended to deny Congress its authority to expatriate unwilling citizens. The evidence indicates that its draftsmen instead expected the clause only to declare unreservedly to whom citizenship initially adhered, thus overturning the restrictions both of *Dred Scott* and of the doctrine of primary state citizenship, while preserving Congress' authority to prescribe the methods and terms of expatriation.

The narrow, essentially definitional purpose of the Citizenship Clause is reflected in the clear declarations in the debates that the clause would not revise the prevailing incidents of citizenship. Senator Henderson of Missouri thus stated specifically his understanding that the "section will leave citizenship where it now is."[43] Senator Howard, in the first of the statements relied upon, in part, by the Court, said quite unreservedly that "This amendment [the Citizenship Clause] I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their

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[42] See, *e. g.*, the comments of Senator Johnson of Maryland; Cong. Globe, 39th Cong., 1st Sess., 2893. It was subsequently acknowledged by several members of this Court that a central purpose of the Citizenship Clause was to create an independent basis of federal citizenship, and thus to overturn the doctrine of primary state citizenship. *The Slaughter-House Cases*, 16 Wall. 36, 74, 95, 112. The background of this issue is traced in tenBrock, The Antislavery Origins of the Fourteenth Amendment 71–93.

[43] Cong. Globe, 39th Cong., 1st Sess., 3031. See also Flack, The Adoption of the Fourteenth Amendment 93. In the same fashion, tenBrock, *supra*, at 215–217, concludes that the whole of § 1 was "declaratory and confirmatory." *Id.*, at 217.

jurisdiction, is . . . a citizen of the United States." [44] Henderson had been present at the Senate's consideration both of the Wade-Davis bill and of the Enrollment Act, and had voted at least for the Wade-Davis bill.[45] Howard was a member of the Senate when both bills were passed, and had actively participated in the debates upon the Enrollment Act.[46] Although his views of the two expatriation measures were not specifically recorded, Howard certainly never expressed to the Senate any doubt either of their wisdom or of their constitutionality. It would be extraordinary if these prominent supporters of the Citizenship Clause could have imagined, as the Court's construction of the clause now demands, that the clause was only "declaratory" of the law "where it now is," and yet that it would entirely withdraw a power twice recently exercised by Congress in their presence.

There is, however, even more positive evidence that the Court's construction of the clause is not that intended by its draftsmen. Between the two brief statements from Senator Howard relied upon by the Court, Howard, in response to a question, said the following:

> "I take it for granted that after a man becomes a citizen of the United States under the Constitution

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[44] Cong. Globe, 39th Cong., 1st Sess., 2890. See also the statement of Congressman Baker, Cong. Globe, 39th Cong., 1st Sess., App. 255, 256. Similarly, one month after the Amendment's passage through Congress, Senator Lane of Indiana remarked that the clause was "simply a re-affirmation" of the declaratory citizenship section of the Civil Rights Bill. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 74.

[45] Senator Henderson participated in the debates upon the Enrollment Act and expressed no doubts about the constitutionality of § 21, Cong. Globe, 38th Cong., 2d Sess., 641, but the final vote upon the measure in the Senate was not recorded. Cong. Globe, 38th Cong., 2d Sess., 643.

[46] See, *e. g.*, Cong. Globe, 38th Cong., 2d Sess., 632.

> he cannot cease to be citizen, *except by* expatriation or *the commission of some crime by which his citizenship shall be forfeited.*" [47] (Emphasis added.)

It would be difficult to imagine a more unqualified rejection of the Court's position; Senator Howard, the clause's sponsor, very plainly believed that it would leave unimpaired Congress' power to deprive unwilling citizens of their citizenship.[48]

Additional confirmation of the expectations of the clause's draftsmen may be found in the legislative history, wholly overlooked by the Court, of the Act for the Relief of certain Soldiers and Sailors, adopted in 1867. 15 Stat. 14. The Act, debated by Congress within 12 months of its passage of the Fourteenth Amendment, provided an exception from the provisions of § 21 of the Enrollment Act of 1865 for those who had deserted from the Union

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[47] Cong. Globe, 39th Cong., 1st Sess., 2895.

[48] The issues pertinent here were not, of course, matters of great consequence in the ratification debates in the several state legislatures, but some additional evidence is nonetheless available from them. The Committee on Federal Relations of the Texas House of Representatives thus reported to the House that the Amendment's first section "proposes to deprive the States of the right . . . to determine what shall constitute citizenship of a State, and to transfer that right to the Federal Government." Its "object" was, they thought, "to declare negroes to be citizens of the United States." Tex. House J. 578 (1866). The Governor of Georgia reported to the legislature that the "prominent feature of the first [section] is, that it settles definitely the right of citizenship in the several States, . . . thereby depriving them in the future of all discretionary power over the subject within their respective limits, and with reference to their State Governments proper." Ga. Sen. J. 6 (1866). See also the message of Governor Cox to the Ohio Legislature, Fairman, *supra*, at 96, and the message of Governor Fletcher to the Missouri Legislature, Mo. Sen. J. 14 (1867). In combination, this evidence again suggests that the Citizenship Clause was expected merely to declare to whom citizenship initially attaches, and to overturn the doctrine of primary state citizenship.

forces after the termination of general hostilities. Had the Citizenship Clause been understood to have the effect now given it by the Court, surely this would have been clearly reflected in the debates; members would at least have noted that, upon final approval of the Amendment, which had already obtained the approval of 21 States, § 21 would necessarily be invalid. Nothing of the sort occurred; it was argued by some members that § 21 was imprudent and even unfair,[49] but Congress evidently did not suppose that it was, or would be, unconstitutional. Congress simply failed to attribute to the Citizenship Clause the constitutional consequences now discovered by the Court.[50]

Nonetheless, the Court urges that the debates which culminated in the Expatriation Act of 1868 materially support its understanding of the purposes of the Citizenship Clause. This is, for several reasons, wholly unconvincing. Initially, it should be remembered that discussion of the Act began in committee some six months after the passage of the Relief Act of 1867, by the Second Session of the Congress which had approved the Relief Act; the Court's interpretation of the history of the Expatriation Act thus demands, at the outset, the supposition that a view of the Citizenship Clause entirely absent in July had appeared vividly by the following January. Further, the purposes and background of the Act should not be forgotten. The debates were stimulated by repeated requests both from President Andrew Johnson and from the

[49] Senator Hendricks, for example, lamented its unfairness, declared that its presence was an "embarrassment" to the country, and asserted that it "is not required any longer." Cong. Globe, 40th Cong., 1st Sess., 660–661.

[50] Similarly, in 1885, this Court construed § 21 without any apparent indication that the section was, or had ever been thought to be, beyond Congress' authority. *Kurtz* v. *Moffitt*, 115 U. S. 487, 501–502.

public that Congress assert the rights of naturalized Americans against the demands of their former countries.[51] The Act as finally adopted was thus intended "primarily to assail the conduct of the British Government [chiefly for its acts toward naturalized Americans resident in Ireland] and to declare the right of naturalized Americans to renounce their native allegiance"; [52] accordingly, very little of the lengthy debate was in the least pertinent to the present issues. Several members did make plain, through their proposed amendments to the bill or their interstitial comments, that they understood Congress to have authority to expatriate unwilling citizens,[53] but in general both the issues now before the Court and questions of the implications of the Citizenship Clause were virtually untouched in the debates.

Nevertheless, the Court, in order to establish that Congress understood that the Citizenship Clause denied it such authority, fastens principally upon the speeches of Congressman Van Trump of Ohio. Van Trump sponsored, as one of many similar amendments offered to the bill by various members, a proposal to create formal machinery by which a citizen might voluntarily renounce his citizenship.[54] Van Trump himself spoke at length in support of his proposal; his principal speech consisted chiefly of a detailed examination of the debates and

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[51] Tsiang, *supra*, at 95. President Johnson emphasized in his Third Annual Message the difficulties which were then prevalent. 6 Richardson, Messages and Papers of the Presidents 558, 580–581.

[52] Tsiang, *supra*, at 95. See also 3 Moore, Digest of International Law 579–580.

[53] See, *e. g.*, Cong. Globe, 40th Cong., 2d Sess., 968, 1129–1131.

[54] Van Trump's proposal contained nothing which would have expatriated any unwilling citizen, see Cong. Globe, 40th Cong., 2d Sess., 1801; its ultimate failure therefore cannot, despite the Court's apparent suggestion, help to establish that the House supposed that legislation similar to that at issue here was impermissible under the Constitution.

judicial decisions pertinent to the issues of voluntary renunciation of citizenship.[55] Never in his catalog of relevant materials did Van Trump even mention the Citizenship Clause of the Fourteenth Amendment;[56] so far as may be seen from his comments on the House floor, Van Trump evidently supposed the clause to be entirely immaterial to the issues of expatriation. This is completely characteristic of the debate in both Houses; even its draftsmen and principal supporters, such as Senator Howard, permitted the Citizenship Clause to pass unnoticed. The conclusion seems inescapable that the discussions surrounding the Act of 1868 cast only the most minimal light, if indeed any, upon the purposes of the clause, and that the Court's evidence from the debates is, by any standard, exceedingly slight.[57]

There is, moreover, still further evidence, overlooked by the Court, which confirms yet again that the Court's view of the intended purposes of the Citizenship Clause is mistaken. While the debate on the Act of 1868 was still in progress, negotiations were completed on the first of a series of bilateral expatriation treaties, which "initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations." *Perez* v. *Brownell, supra*, at 48. Seven such

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[55] Cong. Globe, 40th Cong., 2d Sess., 1800–1805.

[56] It should be noted that Van Trump, far from a "framer" of the Amendment, had not even been a member of the Congress which adopted it. Biographical Directory of the American Congress 1774–1961, H. Doc. No. 442, 85th Cong., 2d Sess., 1750.

[57] As General Banks, the Chairman of the House Committee on Foreign Affairs, carefully emphasized, the debates were intended simply to produce a declaration of the obligation of the United States to compel other countries "to consider the rights of our citizens and to bring the matter to negotiation and settlement"; the bill's proponents stood "for that and nothing more." Cong. Globe, 40th Cong., 2d Sess., 2315.

treaties were negotiated in 1868 and 1869 alone; [58] each was ratified by the Senate. If, as the Court now suggests, it was "abundantly clear" to Congress in 1868 that the Citizenship Clause had taken from their hands the power of expatriation, it is quite difficult to understand why these conventions were negotiated, or why, once negotiated, they were not immediately repudiated by the Senate.[59]

Further, the executive authorities of the United States repeatedly acted, in the 40 years following 1868, upon the premise that a citizen might automatically be deemed to have expatriated himself by conduct short of a voluntary renunciation of citizenship; individual citizens were, as the Court indicated in *Perez*, regularly held on this basis to have lost their citizenship. Interested Members of Congress, and others, could scarcely have been unaware of the practice; as early as 1874, President Grant urged Congress in his Sixth Annual Message to supplement the Act of 1868 with a statutory declaration of the acts by which a citizen might "be deemed to have renounced or to have lost his citizen-

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[58] The first such treaty was that with the North German Union, concluded February 22, 1868, and ratified by the Senate on March 26, 1868. 2 Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers 1298. Similar treaties were reached in 1868 with Bavaria, Baden, Belgium, Hesse, and Württemberg; a treaty was reached in 1869 with Norway and Sweden. An analogous treaty was made with Mexico in 1868, but, significantly, it permitted rebuttal of the presumption of renunciation of citizenship. See generally Tsiang, *supra*, at 88.

[59] The relevance of these treaties was certainly not overlooked in the debates in the Senate upon the Act of 1868. See, *e. g.*, Cong. Globe, 40th Cong., 2d Sess., 4205, 4211, 4329, 4331. Senator Howard attacked the treaties, but employed none of the reasons which might be suggested by the opinion for the Court today. *Id.*, at 4211.

ship." [60] It was the necessity to provide a more satisfactory basis for this practice that led first to the appointment of the Citizenship Board of 1906, and subsequently to the Acts of 1907 and 1940. The administrative practice in this period was described by the Court in *Perez;* it suffices here merely to emphasize that the Court today has not ventured to explain why the Citizenship Clause should, so shortly after its adoption, have been, under the Court's construction, so seriously misunderstood.

It seems to me apparent that the historical evidence which the Court in part recites is wholly inconclusive, as indeed the Court recognizes; the evidence, to the contrary, irresistibly suggests that the draftsmen of the Fourteenth Amendment did not intend, and could not have expected, that the Citizenship Clause would deprive Congress of authority which it had, to their knowledge, only recently twice exercised. The construction demanded by the pertinent historical evidence, and entirely consistent with the clause's terms and purposes, is instead that it declares to whom citizenship, as a consequence either of birth or of naturalization, initially attaches. The clause thus served at the time of its passage both to overturn *Dred Scott* and to provide a foundation for federal citizenship entirely independent of state citizenship; in this fashion it effectively guaranteed that the Amendment's protection would not subsequently be withheld from those for whom it was principally intended. But nothing in the history, purposes, or language of the clause suggests that it forbids Congress in all circumstances to withdraw the citizenship of an unwilling citizen. To the contrary, it was expected, and should now be understood, to leave Congress at liberty

[60] 7 Richardson, Messages and Papers of the Presidents, 284, 291. See further Borchard, Diplomatic Protection of Citizens Abroad §§ 319, 324, 325.

to expatriate a citizen if the expatriation is an appropriate exercise of a power otherwise given to Congress by the Constitution, and if the methods and terms of expatriation adopted by Congress are consistent with the Constitution's other relevant commands.

The Citizenship Clause thus neither denies nor provides to Congress any power of expatriation; its consequences are, for present purposes, exhausted by its declaration of the classes of individuals to whom citizenship initially attaches. Once obtained, citizenship is of course protected from arbitrary withdrawal by the constraints placed around Congress' powers by the Constitution; it is not proper to create from the Citizenship Clause an additional, and entirely unwarranted, restriction upon legislative authority. The construction now placed on the Citizenship Clause rests, in the last analysis, simply on the Court's *ipse dixit*, evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power.

I believe that *Perez* was rightly decided, and on its authority would affirm the judgment of the Court of Appeals.